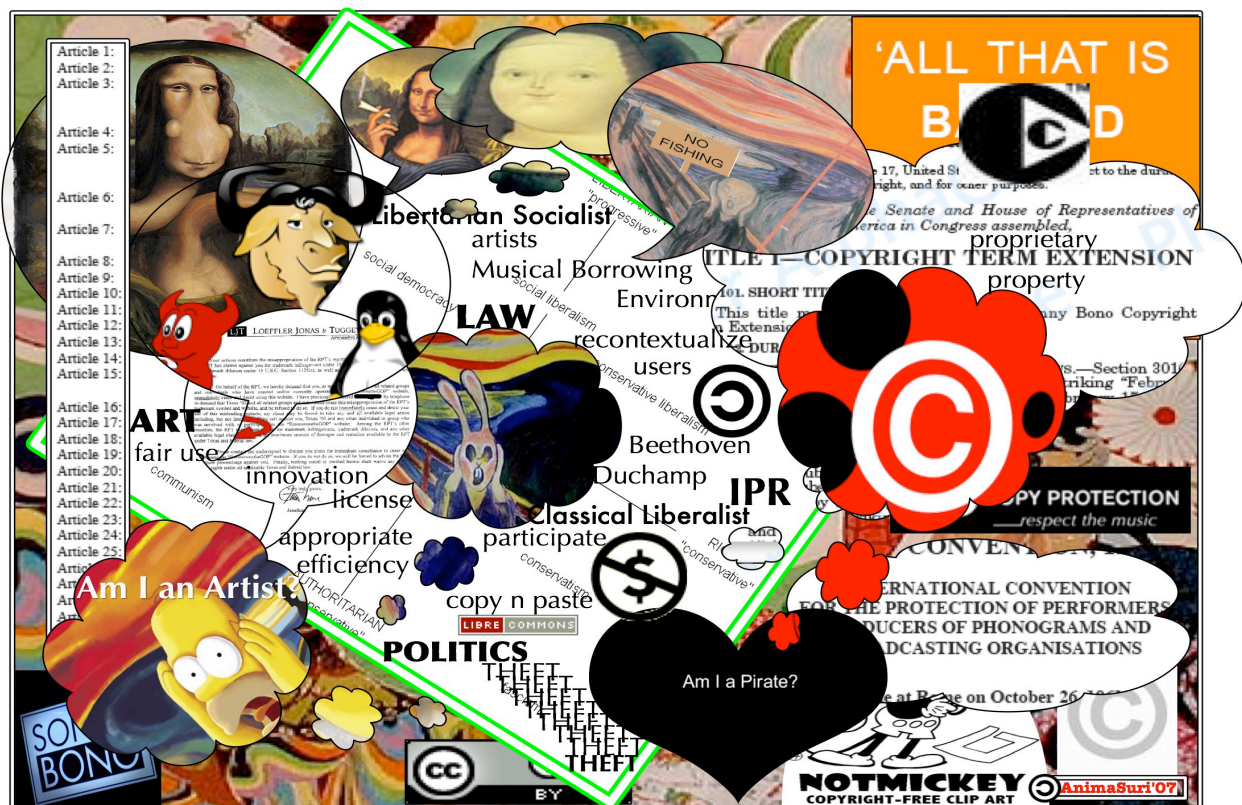


COPYRIGHT MECHANISMS AND ARTISTIC STRUGGLES.



Supervisor:
dr. R. Gabriëls.

Second Supervisor:
dr. K. Wenz.

Jan Hauters
ID 45134
Pigeonhole 55
Date: 15-June-07
Version: final draft.

To Katleen Mentens

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Introduction.

Piracy has been portrayed, rather deceptively, through mass media, as a covert clandestine business somewhere in a dark alley. In fact, pirates, for example in Běijīng¹ are operating in the open within ordinary or even neatly organized shops where they are conventional employees selling irregular goods intertwined with regular ones on ordinary shelves. Three of the numerous areas in Běijīng are illustrative as places where copies of CDs and DVDs are sold: XīnJiēKǒu², WǔDàoKǒu³ and SānLǐTùn.⁴ One might almost think that such DVD/CD shops are more common in these locations than bakers and butchers. One such shop can be found in SānLǐTùn Běi Lù⁵, a street located amidst the embassy neighborhood. In fact, the shop is right across the Belgian embassy, within a two-story building sharing a space with one of the largest state-owned supermarkets, a China Friendship Store (Yǒu Yī Shàng Diàn).⁶ It is as if it's simply another department between the meat section and the traveler's guides. For the local citizens this is an expensive supermarket with genuine foreign consumer products. In the same area, on the other side of the block a similar supermarket provides identical DVD and CD services. Amongst the numerous embassy workers or expatriates, with their shopping basket filled with western groceries, high quality imported French wine, Columbian coffee, or a box of genuine Belgian chocolates, one can follow their lead and shop for a daily dose of DVDs or CDs. At the cashier's counter the latest film or music releases are being promoted.

Not from the shop's environment, not from its customers, not from its service nor from the quality of the products sold could someone tell these discs are or are not pirated. Probably one can assume they are, based on the stigma China's domestic market has received, or from the sale price. Though, even at low prices it is possible to buy legal copies too. In such shops, the sales and purchase of pirated products seems to be the most common thing.⁷

¹ In some sources also referred to as Peking; Chinese: 北京

² Chinese: 新街口

³ Chinese: 五道口

⁴ Chinese: 三里屯

⁵ Chinese: 三里屯北路

⁶ Chinese: 友谊商店

⁷ This little anecdote is a paraphrasing of a trustworthy eyewitness account from someone who has been living in Běijīng, for an extensive period of time and wishes to remain anonymous.

Piracy is the act of unauthorized, thus unlawful, duplication on a large scale of intellectual property, specifically copyrighted works. These works are, due to their nature, predominantly intellectual or artistic ones. They are intangibles, fixed on an array of media though mainly on electromagnetic tape, CD, and DVD, or are quasi-fixed through digital networks. Piracy creates a tension between extreme opposing ideas and a struggle between actors on a global scale: between the owners of the intangible works and those who have financial gain from the unauthorized practice. On the one extreme of the spectrum we find the pirates willing an environment free from control over their practices. On the other side of the spectrum we find actors with the idea that any degree of copying is theft.

The discourse surrounding piracy is a manifestation of a power struggle between several actors. This discourse influences this struggle to the extent that it leaves but little discursive space for any other thoughts and expressions within the grey area between the extreme points. For example, when searching the Internet, online newspapers mention the word piracy relatively often. Of course, it must be mentioned that “Piracy” has besides its relation to copying, also story-telling values. A simple online search of the term without the verification of its sources is therefore misleading. This issue of being misleading is indeed of importance when thinking about possible nuances between the abovementioned extremes. Take the Oxford Dictionary, for instance, and the word’s larger denotation becomes clear through its primary and secondary meanings: “Piracy... The practice of attacking and robbing ships at sea... A similar practice in other contexts, esp. hijacking: air piracy...” (Hanks & Pearsall, 1998). As it is of importance within an online search for hits to be listed as closely as possible to the top, so it is comparably important in dictionaries for a denotation to be listed at the top. In this discussion it is fascinating to see that on a third place in the dictionary’s listing comes: “The unauthorized use or reproduction of another's work: software piracy.”⁸ Before coming to this last denotation, the context has already been set, the dramatic story already told. The dictionary’s listing is in itself misleading. One might have been living in a landlocked area, and protected from such bedside stories telling of “raw” individuals marauding the seven seas, but for many a semiotic connection, through stories dealing with these seafaring criminals, has possibly increased fear, and disgust in relation to the third kind of “pirate”. This emotional connection might actually assist to strengthen the possible

⁸ Notice that the definition does not mention anything about other intellectual and artistic works besides software. In fact the term can easily be used for them as well. Though, “piracy” should not be mistaken with “counterfeit”, which is an imitation, a fraud, or a fake. It is not simply a copy, which is not fake. An example of counterfeit is a fake Rolex watch. Piracy is not exactly “contraband” either, which is illegal import or export of goods. Smuggling is an example of the latter.

interpretation of the graveness when it comes to intellectual property being pirated. It is indeed the implied connotation of “marauding” that strengthens the need to abolish piracy once and for all. As such a blurring exists between the intangible actions surrounding copying creative works versus the imagined tangible horrors of a rogue one-eyed pirate with his wooden leg and blood-rusty sword, enforcing the handover of gold and jewelry, and consequentially leaving no men alive.

Not to mention that, within the media and political debate, piracy, of the third kind, has additionally been associated to organized crime and even to terrorism.⁹ It is as such possible to conceive of a consumer-citizen’s fear for repercussion in an absurd mix with her or his compulsion to copy. Also is it not too far fetched that alternative views, concerning copying as a practice besides piracy, become hard to support. It is in such realm with built-in utterances forming stories, and legal or other discourses, we create meaning, judgments and our daily operational realities. At first sight, the plan of action in relation to copying creative works seems clear, it should be considered, without a doubt, illegal. Piracy is an unlawful action of copying, consequentially distributing, and selling of property that one is not to have at one’s own disposal in the first place.¹⁰ The latter could be seen as such when it happens without the consent of the owner of the creative work. This owner, by the way, is not necessarily the creator. This owner could be a multinational corporation. One possibly becomes convinced that the proprietor, or those actors whom own the work or have the temporary rights to the work, should be able to maintain full control at all times. One might then judge all kinds or all degrees of action closely or remotely related to copying as being some form of piracy, and thus to be more or less accurately defined as illegal.

Piracy sets a present-day tone through quick common sense thinking of, for instance, ownership, law, and criminal acts. Here ownership is that of creations that are protected under Intellectual Property Rights (IPR) and in relation to piracy, protected under copyright law; a subset of IPR.

Eventhough Piracy is illegal; are therefore all forms of copying illegal? Piracy is a form of extreme copying. Is it as much extreme as it is when stating that all copying is theft? Piracy is part of larger international economic developments. Is the issue of copying all that straightforward? For that matter, is ownership or copyright law straightforward? Is any

⁹ I suggest to enter the keywords into your search engine: “piracy” AND “organized crime” AND “terrorism”. For instance on Google you will be served with a supposed 133000 hits. An interesting link to an alternative twist on the polemics is http://www.house.gov/list/press/ca28_berman/intl_copyright_piracy.html (retrieved March 2007).

¹⁰ It should be noted, piracy is the act of illegal copying but doesn’t explicitly include any illegality surrounding the act of sales even less the act of purchase.

content created through copying, unconditionally illegal? Is the purpose of copying simply economical in nature? Is or should all cultural products be property of one or other individual or corporation? If it were, would it be legitimately so? Is the tension of copying within the struggle between pirates and proprietors more complex than simple the opposition of criminal versus victim? These questions might pop up when thinking about the issue of copying cultural property and the labor that goes hand in hand with the creation of the copyrighted work or a secondary work created through one or other form of copying. These questions are also explicitly or implicitly intertwined in the tension and struggle described within this thesis. The choices actors make in relation to these questions position them towards one or other side of the extremes.

Central to the questions each actor has in the debate on copying cultural products is inevitably copyright law. Copyright, to some, is a driving force, and to others, it is a paralyzing force in creating content within any media. Copyright defines the creative work in relation to its creators, its owners and its exploiters. As such copyright implies a series of well-established actions or, simply put, it implies mechanisms. “Mechanism” is used with its denotation of an “established [yet concomitantly contested] process, [which is a series of actions], by which something takes place or is brought about” (Hanks & Pearsall, 1998). It must be underlined that “mechanism” is interlocked with the concept of “being established”. Therefore “mechanism” is implying recognition over time, in a specific place, from an institution, or through a power relation. Indeed there have been various parallel mechanisms developed depending towards which side of the spectrum one tends to look at copyrighted materials. Copyright mechanisms are created through media¹¹ and are creating media.¹² They are created by certain cultures and create certain cultures.¹³ These bold statements become clear throughout this thesis.

The pirates or proprietors are not the only actors in the struggle concerning copying. Artists too are partaking in it. Amidst the views on copyright, and making the tensions surrounding proprietors and pirates more intriguing, are artists and their creations. Artists and their series of actions are not simply subscribing to one or other of the two extremes: free copying versus any copying being theft. From this follows, artists neither simply dismiss nor

¹¹ Something is only copyrighted when fixed within a medium.

¹² The Internet, as well as other media, put oversimplified, are altered due to shifts in application, forms and mechanisms of copyright (and IPR in general).

¹³ The intertwined state between copyright and culture will become especially clear in the analysis of cases within Part Two of this thesis.

follow the established series of actions related to copyright. The artistic participation is related to the series of actions they exhibit and struggle with, while creating works that overlap the debated realm of copying. This overlap is instigated when their work is partly based on the copying of existing works. When the artist copies, is the artist a pirate? What do artists have available to negate such possible claim within debates concerning their creative series of actions, or differently put, their *creative* mechanisms? Looking at the current discourse, partly mentioned above, their discursive space might be rather limited.

The struggle between the actors can be followed as it unfolds within a publicly accessible environment such as the Internet with its artist's websites, transnational organizations dealing with Intellectual Property Rights (IPR) and its subset known as copyright, art- and law-related blogs, newspaper articles and journals with specific papers on creative works and the related laws, etc. The topics within these sources are, on the one hand, concerning the influences of copyright mechanisms on the artist's freedom to express, intertwined with their usage of copyrighted materials as sources of expression. On the other hand the topics relate to proprietors and their freedom from infringement of their copyrighted materials and the obligation to interact by means of copyright licenses.

This thesis looks at the mechanisms these artists have available that make it possible for them to partake in the debate or even instigate the debate due to the results of using particular contested copyright and artistic mechanisms. This implies the central question to this thesis: how do different copyright mechanisms influence the artist's struggle during their participation within the public sphere?

Although this thesis touches on several issues having implications to the legal, it is a work neither describing nor discussing law directly. It tries however to classify the parties and their views on law, commerce, innovation and forms of participation by means of three models, which can be used to look upon the kind of power struggle and how it influences concepts of copyright, or rather, copyright mechanisms.

The central question explores the struggle from the premise that the artist wishes to participate in the market and in the public debates and this stuck between the extreme positions of the pirate and the proprietor. The struggle, here focused on, leaves the pirates in the background and directs the attention towards the artists and proprietors. The latter one can be the author, or those actors whom have made a work, be it intellectual, artistic or other; or simply the owner, or those actors whom own the work or have the temporary rights to the work. These actors wish to be acknowledged for their labor, transforming them into artists

and/or holders of property. Many proprietors, as well as artists, wish, to enclose their participation, their creations, their cultural identities, and their goods. These wishes seem to take shape in various conflicting forms and degrees. The forms of enclosure can be obtained or exerted on a contract basis, on the basis of attribution or acknowledgement, on the basis of financial restitution, etc. The extent, of the previously mentioned issues, is indeed central to a debate surrounding both intellectual as well as artistic expressions.

The artistic expressions are a series of actions intertwined with the more or less established processes of copying. Specifically one set of copying and creating is explored throughout the thesis, namely artistic mechanisms of appropriation.

The concept of appropriation is at least linguistically useful here. Etymologically and denotatively it refers, on the one hand, to “property”, implicitly connecting an action or work with possession through its Latin root “appropriare” which means as much as “make one's own”; and “proper”, implying morality, and legitimacy, and on the other hand actions surrounding the “taking without permission” or a pejorative view on an action integrating preexisting parts of artistic work in a successive work of art (Hanks & Pearsall, 1998).

For decennia on end artists, or those actors whom create a work using parts of an existing work, have more or less euphemistically “borrowed” from one another and from their environment. Music, for instance, is a medium providing typical examples. Musical borrowing and other artistic borrowing are, within this thesis, mechanisms of artistic appropriation¹⁴. Appropriation is not only in one art form an observable activity but rather through *most* art forms. Whether intended, malevolently, unconsciously or with respect, these are a common user practices.¹⁵ Yet, should it utterly be accepted as proper?

So, these are the ingredients for this debate, which is mixing priorities concerning property, law, and artistic expression. As written before, the actors in the debate especially collide at the level of copyright. There are two parts in this thesis to explore the central question and its ingredients. Part One is a theoretical segment followed by, Part Two, being an empirical one. It is the intention, through Chapter One and Two, within Part One, to analyze the power struggle. Firstly, Chapter One, is started off with issues on copyright by introducing copyright as a set of mechanisms that are not homogenous, not conform to one

¹⁴ Throughout the thesis the term “mechanism of artistic appropriation” is used synonymously, if not otherwise defined, with “appropriationist mechanism” and simply “appropriation”.

¹⁵ Here “user” can be understood as a hybrid between “consumer” and “artist”. The user consumes the creative work and on a creative level, as artist or creative participant, appropriates (parts of) the creative work into her or his own creative work.

single string of thought. Secondly, the criteria, for demarcation depending on the point of view one utilizes, are organized, in this thesis, by framing them through three models, formed by political and socio-economic points of view. These models function on a dual level: descriptive as well as normative. Actors, subscribing to one or other view, become more understandable by means of analyzing their stance through an appropriate model; the same actors might become disagreeable when observed through another model.

In Chapter Two of Part One, firstly some basic elements of discourse are explored based on principles handpicked from for instance Foucault. Spending a moment on discourse is of the essence in trying to understand how a struggle comes into existence and how it is maintained, as well as how a dominant position, such as an idea that any copying is theft, could be maintained. In continuation to that, some concepts related to the struggle based on the tension between labor and appropriation are handled. A question in analyzing this tension is concerning the way how the concept of labor fits into the mix of artistic participation and vice versa by basing the analysis on older and newer theories. Another is whether appropriation can be seen as a form of labor. So too tensions arise between appropriation, to some a form of theft, and the sovereignty of property. A last one is how labor is or isn't related to copyright and to the models through which the artist's struggle is analyzed. One or other thought might become more attractive or appreciated depending on what one considers legal or morally right. As a concluding part specific focus is provided on artistic appropriation.

In Part Two of the thesis and on a level of praxis, various groups, being communities, participants, etc., show their struggle through case analyses of how they interact, and how they are intertwined. In this part three cases are studied in which artists, authors and proprietors are intertwined and in struggle with one another through their different approach, priorities, interests and views on what is legal, and what is legitimate, within the particular case. Is creative output altering the concepts on copyright (or intellectual property in general) and vice versa? What are some of the theories that can be used to analyze possible alterations to the public sphere, the commons, copyright, or to concepts of creative or artistic innovation?

Finally the thesis works within conclusions towards the central question and how different copyright mechanisms influence the artist's struggle during their participation within the public sphere.

Part One.

Theoretical Considerations.

Chapter One.

Available and Proposed Systems.

1.1. Introduction.

Is copyright simple and straightforward? Is it a legal provision covering all the needs of each and everyone equally and uniformly? Is everyone unified behind the copyright law or is there a tension, a struggle and a debate surrounding copyright? What is this debate and disagreement based on? A struggle can be viewed in a more detached way if one were able to categorize certain priorities motivating the actors. In this chapter the basis is laid for three models through which the struggle in relation to copyright mechanisms can be analyzed. To arrive at the models short moments of attention must be given to the steppingstones leading towards them. At least a basic understanding of copyright within its Intellectual Property Rights (IPR) context is obviously needed. The struggle and the participants, surrounding copyright issues, are introduced. A light is shed on an altered perception of copyright as something that cannot simply be seen as black and white. How can one look at the applications, variations or shifts in copyright related processes?

In paragraph 1.2 copyright is shortly discussed within a larger setting of privatization after which in the following paragraphs from 1.4 to 1.7 three models are explored to look at the struggle concerning copyright and artistic participation by means of appropriation. In paragraph 1.3 a short and general overview will be given surrounding the models. The following three sections will cover one model each. Section 1.7 provides a summary comparing each model ending with a schema providing comparable terms between the three models.

1.2. Copyright – What’s the big deal?

“Drawing the lines between knowledge goods accessible to all and those subject to private property rights has always been delicate, controversial, and economically uncertain task in even the most developed economies.”¹⁶

At present times the understandable big push forward against piracy has made the difference between criminal behavior and artistic processes even more precarious. Tensions are not merely occurring within debates. The issue is probably additionally convoluted due to socio-economic developments related to intellectual property as a whole. The abovementioned push forward influences actions, resolutions, and alterations in the law and social environments. Generally put, the private and the public spheres are altered in an inversely proportional way: while the first tends towards enlargement the second shrinks or vice versa.¹⁷ This for example implies that actors within the private sphere might wish to obtain more property, requesting more possibilities for commodification. It results in public spheres gradually being enclosed, thus being altered, being privatized and shrinking. The enclosed refers to a historical denotation: “The process or policy of fencing in waste or common land so as to make it private property” (Boyle, 2003, p.64). Here “land” is substituted by intangible “land” of artistic, literary or intellectual works. In analogy to the farmland having been privatized, or in other words, enclosed, in the past, the creative public “land” is being enclosed as well (Marx, 1867, Vol1Ch27; Boyle, 2003). According to some, the enclosure of creative works¹⁸ stimulates growth and progress. But in the eyes of others it doesn’t. That what is not enclosed is public, or common. That what *is* enclosed is private, it is thus property. This movement of enclosing and the resistance against it is one of the main tensions resulting in a struggle, such as through the public debate that is within the scope of this thesis. Besides dynamics of enclosure, leading to the ownership of intellectual property, there are also some important parts of the public spheres intertwined and altered by the

¹⁶ Maskus, & Reichman. 2004; p.292

¹⁷ One might read: the *Sonny Bono Copyright Term Extension Act*, the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, the *Consumer and Investor Access to Information Act of 1999*, *Digital Millennium Copyright Act*, the *Database Investment and Intellectual Property Antipiracy Act of 1996*, etc.

¹⁸ The term “creative works” within this thesis will be synonymous to artistic, or literary or intellectual works.

movement towards or away from enclosure. They are those parts referred to as the “public domains” or the “commons”. The latter in relation to intellectual and artistic works is referred to the “creative commons”. These terms are essential and need further explanation.

The Public domain is that part of the public sphere that contains these intellectual, literary and artistic works that are not (entirely) monopolized and are thus (entirely or) to a certain extent open for access to the public. The access can be a freedom to read, copy, or make derivative works for non-commercial or commercial purposes.¹⁹

Boyle evaluates the public domain adequately for the purpose here when he writes “The public domain will change its shape according to the hopes it embodies, the fears it tries to lay to rest, and the implicit vision of creativity on which it rests. There is not one public domain, but many” (Boyle, 2003, p.62). Here the “commons” are not simply a set of public domains, because within the commons licensing agreements are still essential to the usage of any of the works within the commons. Licensing implies that one citizen cannot freely take and become proprietor of that resource but rather has to follow the requests, the guidelines of initial developers, innovators or creators. If there are no licensing obligations then the work is a resource for further derivations at the will of anyone: the work is up for grabs, it is then entirely in the public domain. Deducted from that there is a distinction between works in the public domain and those within the creative commons.²⁰ Boyle refers to the general concept of “the commons” in distinction from the concept of “public domain”, and writes “What is true for the public domain turns out to be true also for the... language that seeks to circumscribe and offer limits to the enclosure movement: the language of the commons. The ‘commons’... refer to wellsprings of creation that are outside of, or different from, the world of intellectual property. The Internet was seen as such a commons”(ibid.). The public domain and the commons are the “opposite of property.” To Boyle, the public domains and the commons might be different spheres, they both do “jockey for position as the instantiation of intellectual property’s ‘outside’” (ibid). All three: classically copyrighted works (as a part of intellectual property which in itself is a subset of private property), the “creative commons” (which refers back to an altered view on intellectual property) and the “public domain” are resources for participating artist-citizens. Yet, the first one puts up stronger legal and

¹⁹ For more detailed information on this topic one can be referred to relevant articles by David Bollier and Tim Watts, David Lange, Edward Samuels, James Boyle, Jessica Litman, Julie Cohen, Pamela Samuelson, Terrence A. Maxwell,, Yochai Benkler et al.

²⁰ Lawrence Lessig, whom is, amongst other achievements, also known for his writings such as his 2004 book *Free Culture*, founded this licensing system. It can be legally downloaded from <http://www.free-culture.cc/freeculture.pdf> (Last retrieved March 17, 2007)

financial fences, the second more flexible ones, and the third one seems entirely open. The enclosing fences of any of these spheres do not necessarily limit the emotional or intellectual drive to critique, debate, or create.

Boyle refers to the Internet being a commons. It is often hand-in-hand with the Internet that illegal copying is debated. Throughout cyberspace different actors suggest different ways (especially through suggestions related to copyright) to support, alter or oppose developments in how not simply the Internet as an abstract space can be privatized or be a public space but rather its content can and should be accessed, exchanged and managed amongst individuals or communities. It is the Internet and mainly its artistic content this thesis focuses on.

The online debate concerning copyright, and the public domain, is taking form, and given shape within academic and specifically law-related circles. The struggle between *various* actors, concerning copyright, property and publicly available cultural resources, that makes this debate worthwhile is shaped by creative expressions from activists and artists alike, opposing or supporting one another in a struggle surrounding control, community and creativity. They have additional elements in common: each of the actors struggles with copyright, alternatives to copyright, or variations thereof.

Copyright is a set of legal rights related to an intangible and abstract form of property, namely intellectual property. Specifically it is a set of rights in relation to creative or artistic works such as software, multimedia and new media works. Also included are media as film, literary works, musical or sound works, paintings, photographic works, dramatic and choreographic works, etc. These rights are applicable the moment the work is contained or fixed within a medium, a physical (or tangible) form (paper, electromagnetic tape, CD, DVD, etc.). In addition to the property right there are the “Moral Rights”, protecting the rights of the author (WIPO, 1979, article 6*bis*). Oversimplified the “Moral Rights” are those in relation to attribution of the author and the integrity of the work.²¹ The purpose of these rights is to protect the authors, the proprietors and to stimulate innovation.

The surrounding debate, the confusion and frustrations expressed in them, is not simply engaged into with the intent to “construct a unified and seamless totality” (Scaff,

²¹ For further details and verification one might consult (inter)national copyright laws and also, to name but few, the 1979 Berne Convention for the Protection of Literary and Artistic Works, the 1961, Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, or the 1994 WTO’s TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights.

2005, p.11). The online discourse studied for this thesis, surrounding the topic of Intellectual Property Rights (IPR), and its subcategory of copyright in specific, seems different from the discourse related to the “more homogeneous dominant practices” one might more easily take for granted without any further notice (Fairclough, 1992, p.15). Copyright, for instance, might, at first sight, seem to be “... simply there, rather than as having been put there through processes of contestation with alternative practices, and as having been ‘invested’ with particular [sets of ideas], and as helping to sustain particular relations of power within society” (Fairclough, 1992, p.15). The “processes of contestation”, if they ever were less observable, are now more than ever available for observation and analysis through online resources. Processes of dispute exist surrounding how flexible the system should be in allowing parts of copyrighted materials, under what is known as the Fair Use Clause (or copyright bargain²²), to be appropriated and which quantity or what quality (e.g. the hook-line of a pop song, the essence of a work, etc.) constitutes infringement. Additionally there is a battle on the issue of extent (the duration of the rights) and on whether or not intellectual and artistic works should remain or should be proprietary in the first place. Questions are raised whether property owners hijack culture, or whether cultural pirates hijack property. Debates are held, such as within the World Intellectual Property Organization (WIPO)’s online forum, concerning the necessity of a decrease, preservation, or increase of publicly available intellectual or artistic works within public domains or creative commons or whether they should exist in the first place, and so on (Aristotle, 350 B.C.E., Book II part III. 1261b33; Hardin, 1968; Lessig, 2004; Aigrain, 2005; WIPO, “Theme Three”, 2005; et al.)

The disagreements, which are mainly of interest here, are those on issues whether creativity and innovation is stimulated by property or rather by public availability of cultural resources. The differences between the models are based on these issues. The issues are decided by whether or not “authenticity”, “originality” and “author” are essential versus thoughts in the line of “nothing new under the sun”, “building on the shoulders of the ones who came before us”, or “knowledge for the common good” are predominant (Tucker, 2005, p.49; Cover, 2006, p. 140; Aigrain, 2005, p.13). This is of importance as it defines (A) what the artist is free to use as resources and (B) if the artist is sufficiently free from limitations on his forms and media of expression and participation in the cultural environment. The latter issue results in a debate on a normative level whether or not the artist should be (B’) free from limitations on particular processes of copying of proprietary works or rather (B’’) needs

²² See <http://www.publicknowledge.org/issues/why> for the usage of the term.

certain mechanisms providing the freedom to express and innovate within a present-day digital cultural environment.

1.3. Three Models: A General Overview.

An increasing amount of intangibles, such as creative works, as well as other goods that either belonged to a commons, were simply considered property of everyone, or belonged to no one.²³ These intangible resources have become subjects in the debate on whether or not these would be better off if these were privatized, or if these became private property. Such resources can be water sources, indigenous knowledge such as local medicine, ethnic art, types of grains, beans or even human tissue (OHCHR, 1995; Kneen, 2004, pp. 1-5; Charo, 2006, pp. 1517-19).²⁴ These commons are now more and more commodified and are thus no longer freely or on an equal basis, accessible by every citizen.

From a classical liberal point of view, in the likes of Milton Friedman, Ludwig von Mises, and Friedrich Hayek or, more extreme, Robert Nozick and Murray Rothbard this is indeed the solution to many social problems. Rothbard, for instance, is very strong in stating that property is essential in the pursuit of individual liberty. Although Milton Friedman endorses the enforcement of property rights he does oppose the Sonny Bono Copyright Term Extension Act (Senate and House of Representatives, 1998; Englert, 2002, p. 21). This is an act that prolonged the term proprietors could claim rights over creative works resulting in proprietary periods of up to 70 or 95 years beyond the life of the author (Hirtle, 2007). From a libertarian socialist²⁵ or anarchist point of view in the likes of Murray Bookchin, Peter

²³ The question whether certain common elements, goods or nature is owned by everyone or owned by no one depends on political or theological views that are besides the reference to Locke further down, and paragraph 5.3 of the case study within Chapter Five, beyond the scope of this thesis.

²⁴ Charo's article also refers to "Moore v. Regents — a seminal case concerning a patient's interest in the profits derived from patents on a cell line generated from [the patient's] spleen tissue — U.S. jurisprudence still has no coherent answer to a deceptively simple question: Do we own our own bodies?" (Charo, 2006, p. 1517)

²⁵ This term might seem contradictory. Though, with variations in meaning, individuals such as Noam Chomsky use it to label their political orientation. If one were to agree to split the political spectrum simply into four quadrants one could have on the bottom two squares as the authoritarian part of the spectrum and two on the top as the libertarian. Both bottom squares support government and thus centralized control. The left is the spectrum towards communism, or authoritarian socialism and the right is towards conservatism or, more extreme, the

Kropotkin or Pierre-Joseph Proudhon the issue of property (and in this case that of creative works) might be problematic in a rather opposing way. Some anarchist, such as Proudhon claim that property is theft. Other views on property and its consequences are based on Karl Marx and his views on the “enclosure of commons” (Marx, Vol.1Ch.27, 1887). Reworked, these views become what James Boyle refers to in his writings on commodification (commoditization) of intellectual property as a “second enclosure movement” (Boyle, 2003). He argues, “interests of groups currently engaged in individual struggles [should have] ...a sense of the larger context” (ibid.). This larger context, for the purpose of this thesis, is surrounding the public domains, or the creative commons within circumscribed public spheres. How these thinkers and their concepts are of any use to artists is part of the central question within this thesis. This thesis tries to classify movements that halt or stimulate the alteration of those areas within the public sphere that are of importance to artists. Again, these areas are mainly the public domains, the creative commons, or the intellectual property used within the public sphere by these same artists, proprietors and others.

Here below three models are presented, which might add to the debate by providing ways for certain actors to look at the seemingly less accessible legal topic of copyright. These models might provide additional tools to look at a grassroots participation of artists and other participants within newer media such as the Internet. The three identified models are a Classical Liberal model (CLM), a Libertarian Socialist Model (LSM) and an Environmentalist Model (EM).

1.4. The Classical Liberal Model.

The CLM is currently considered a prevailing model. It is based on economic thoughts emerging from the Chicago school as well as the Austrian school of economics. The

fascist part of the spectrum. The top two squares would be the libertarian left and the libertarian right. Both support civil liberties and reduced or ideally no government. The left supports community, unions, the voluntary and the collective and reduction or abolishment of private property. This quadrant includes anarchism or libertarian socialism, etc. The right supports private property and free market as the basis of individual freedom, which might include anarcho-capitalism, or Murray Rothbard's libertarianism. Neo liberalism might be on the borderline between authoritarian and libertarian right. These classifications are not carved in stone. A large amount of variations are available and this one proposed here is certainly open for debate. In this thesis it is merely a guideline. A useful resource, amongst the many, is http://www.educationforum.co.uk/sociology_2/politicalspectrum.htm (last retrieved April 12, 2007)

latter is associated with variations of liberalism; the former as well though focuses especially on private enterprise economy and the limitation of government (Azad, 2005, p.2; Miller, 1962, p. 65). As Boyle puts it: ""Internet policy has been dominated by classical liberal and neo-liberal rhetoric, both inside and outside the law. Admiring (and rather formalistic) discussions of the role of property, contract, and private choice in creating digital space have often seemed to hearken back to classical legal thought"(Boyle, 2000, p.16) It is a proprietary model within which cultural production and distribution is defined and handled as such.

Private property could range from newly invented works to, as mentioned above, the commodification of traditional or spiritual work extracted from ethnic groups, plant DNA, to even human tissue. An EU report does provide a functional stance: "...content distribution, ... retail content for sale, and on-line services now depend on the Internet to establish cost effective, reliable, flexible, highly available, and secure means of managing the delivery of these assets that are the cornerstone of digital commerce and enterprise communication" (European Commission, 2003, p.129). So too are copyrightable works within this model approached as potential or factual assets. Cohen supports this tendency in that "copyright owners wish to create markets for all ratable uses of digital works. Therefore, creative works, which until now have defied the commodification that is the cornerstone of a market-based system, must become commodities" (Cohen, 1998, p.19)

The classical liberal is a mode of thinking, reducing to a minimum the possible market confusion induced by the Fair Use Clause and as such increasing the possibility for activity of corporate market share, increasing control over time and application of private property. Additionally it is a mode of thinking justifying legal departments protecting corporate proprietary intellectual and artistic works (though not owned by the artists but rather as work for hire by corporations) through letters demanding infringers to seize and desist or to simply take these offenders to court. Joseph Bast, president of The Heartland Institute, a classical liberal think tank, defines some key goals related to this model as "Markets, in combination with private property rights and voluntary contracts, produce a self ordering system of social order that leads to prosperity, justice, and harmony" (Bast, 2005, p. 2).

Private property is highlighted through this model. It goes almost without saying when a piece of property needs to be defined as private it needs certain features that can make it distinguishable from the rest. If it were not distinguishable in one or other way from other goods, or other property it could be difficult to maintain its private status. If the private

property is original in one or other way, even in the smallest way, it increases the possibility to maintain it in the private realm. So is it with creative works too. These must be distinguishable from other works. The amount of originality can be minute. The originality can be simply a serial number and an accompanying proof of purchase or ownership. That what has no owner is confusing or suspicious or must be enclosed. Appropriation is allowed at this level where that what is not owned can be open to claim, that what is owned can be open for exchange, in form of a one time monetary exchange or a licensing over a set period of time. Anything that is common is non-productive, non-efficient and must be diminished. Property is controlled through contract and legislation providing, as implicitly mentioned before, individual liberties. To be able to ensure such control conformity to the regulations that organize the market are essential. Within the market individuals interact with the purpose to, as efficiently as possible, maximize property and profit. Systems, processes, mechanisms and media are in function of market share and control. The Internet and other digital technologies are such potential for market share and control within it, anything that could circumvent private property and control thereof is approached with skepticism. Therefore Digital Rights Management (DRM) is an essential tool within concepts that promote private (corporate) property.

Any opposition to private property is opposed. Anything like a creative commons is looked at skeptically. A commonly used quote within the classical liberal discourses concerning the problem with the commons, or as some refer to it as the "tragedy of the commons," is that of Aristotle:

"For that which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. For besides other considerations, everybody is more inclined to neglect the duty which he expects another to fulfill; as in families many attendants are often less useful than a few" (Hardin, 1968, p. 2; Aristotle, 350 B.C.E, Book II part III. 1261b33).

The model is in tension intertwined with the following two models, which look differently at the possibilities within the world of innovation and the property rights related to them. Within a 2001 interview with *The Chicago Sun-Times*, The Microsoft CEO, Steve Ballmer, responded strongly when asked about "open-source", expressing opposition towards views through the second model that is about to be outlined. Paradoxically, Ballmer recognizes the need for opposition as a stimulant for innovation, here defined as "good competition", which could be understood as a metaphor for dialogue on a commercial and productive level:

"Q: Do you view Linux and the open-source movement as a threat to Microsoft?

A: Yeah. It's good competition. It will force us to be innovative. It will force us to justify the prices and value that we deliver. And that's only healthy. The only thing we have a problem with is when the government funds open-source work. Government funding should be for work that is available to everybody. Open source is not available to commercial companies. The way the license is written, if you use any open-source software, you have to make the rest of your software open source. If the government wants to put something in the public domain, it should. Linux is not in the public domain. Linux is a cancer that attaches itself in an intellectual property sense to everything it touches. That's the way that the license works" (*The Chicago Sun-Times*, June 1, 2001).

Clearly from this answer hostility and heightened attention are detectable as well as one could detect hostility from those looking at creative work through models, unfolded next, towards anything proprietary or "closed". The CLM is intertwined in a power struggle with what is defined in the next paragraph as the Libertarian Socialist Model (LSM). This struggle is nothing new, according to work from Marx, especially in volume one, chapter 27, of *Das Kapital*, or more recently within such articles as from Kaminski, the struggle finds its roots in the Antiquities²⁶, "One of the two cultural principles of our civilization, the public culture of citizenship deriving from Antiquity, asks individuals to serve the common good; the other, the pursuit of happiness, ends in the individual's enjoyment of his private property. It derives from the security of individual property right in medieval Europe, where lordships are held as property" (Kaminski, 2003, p. 111).

1.5. The Libertarian Socialist Model.

The LSM, shedding a light around concepts such as civil libertarianism, is a model intended to accentuate the increase of freedom to copy, study, alter, and share (GNU.org, 1998). It is a model providing clarity on those liberties and on actors promoting a discourse for decentralization, reduction of, or even disassembly of hierarchy and opposition of those forms of authority it deems illegitimate (Baake, 2005). By observing by means of

²⁶ See also Aristotle's quote, above, on the commons.

this model it becomes more obvious that "the case for strong copyright protection as the cornerstone of innovation is highly contested" (Flew, 2005, p.1). It is a model where it becomes more obvious that "the most common approach has been to see private property not as the cornerstone of liberty, but as a... threat to it" (Heywood, 1994, p.258). This model is directed towards highlighting creative or intellectual works and freedoms to copy, to alter and share (GNU.org, 1998). An article in the *Oxford Journal of Legal Studies* shifts the attention away from dangers from a coercive state towards those of excessive privatization of creative works which is a concern of those actors seen through the LSM: "dangers lie not only in the old repressive power of the State or in more recent forms of political corruption of art. They lie especially in forms of exclusive privatization of art" (Graber & Teubner, 1998, p. 68).

Through this model one might see various alternatives or alterations to the common copyright law bundled under what is labeled a "copyleft" license. Lessig is to the point when he writes that "a 'copyleft' license, mean[s] a license that requires the licensee to adopt the same terms on any derivative work" (Lessig, 2004, p334). The most common mechanisms following copyleft are Free Software, Open Source, Libre Software, Creative Commons License, the Free Art License and the The Libre Commons Res Communes License. The latter license is outspoken in its worldview:

"The Res Communes license is designed to reject a state-centered legal construct of a commons (or commons without commonalty) in order to create a common which is shared between us in collective practices (a rightful commons with commonalty)... This work is outside of all legal jurisdiction and takes its force and action from the constituent radical democratic practices of the global multitude against the logic of capital" (Berry & Moss, 2006, p. 1).

The polemics between the Open Source and Free Software is an interesting topic for further analysis. Politics, acknowledgment and thus power plays a role between the actors promoting either of the two. As the official site of Open Source explains:

"You can see more detailed explanation of the terms 'open source software' and 'Free Software', as well as related information, in the appendix and [the] list of Open Source Software / Free Software (OSS/FS) references at www.dwheeler.com²⁷... Note that those who use the term 'open source software' tend to emphasize technical advantages of such software (such as better reliability and security), while those who use the term 'Free Software' tend to emphasize freedom from control by another and/or ethical issues. The opposite of OSS/FS is 'closed' or 'proprietary' software." (Wheeler, 2005).

²⁷ Retrievable from www.dwheeler.com—oss_fs_refs.html and http://www.dwheeler.com/oss_fs_refs.html

It suffices, for the purposes here, to add to this, a self-explanatory quote from the Official Free Software site:

"The official definition of 'open source software'... was derived indirectly from our criteria for free software. It is not the same; it is a little looser in some respects, so open source supporters have accepted a few licenses that we consider unacceptably restrictive of the users. Nonetheless, it is fairly close to our definition in practice" (Stallman, 2007).

So, there is a difference between "open " and "free". The fundamental difference between the two movements is in their values, their ways of looking at the world. For the Open Source movement, the issue of whether software should be open source is a practical question, not an ethical one. It is put unambiguously in an authoritative website on the topic:

"Open source is a development methodology; free software is a social movement.' For the Open Source movement, non-free software is a suboptimal solution. For the Free Software movement, non-free software is a social problem and free software is the solution" (GNU.org, 1998).

"Free" implies a way of working which, on the one hand, provides the opportunity for second generation participants, or rather $n+1$ generation participants, such as artists, to add to, or share works. This would be accepted within the provided framework as long as the parent license is followed (as accordance to the Open Source's copyleft license), or as long as the result does not become proprietary (as with the free software movements). In the latter lies the ethical value of free works.

Primarily such works belong to the realm of software, where participants add and share programming code to preexisting projects, or initiate projects to which others can add. The GNU website couldn't make it any more comprehensible when stating that "the General Public License is a copying license which basically says that you have the freedoms we want you to have and that you can't take these freedoms away from anyone else" (GNU.org, 1998). Well known free software projects are such as those based on the *Linux* kernel, or such projects as *Open Office*, and *Wikipedia* to name but few of the many that could for instance be found on the *SourceForge* website. One of the latest large-scale projects involving open source is the OLPC, One Laptop Per Child initiative.²⁸

²⁸ OLPC - One Laptop Per Child's official website is <http://www.laptop.org/index.shtml> For information on the software this initiative applies go to <http://www.laptop.org/laptop/software/index.shtml>

For artistic works a Free Art License or a Creative Commons License could be alternatives to the regular copyright license setup. The Free Art License, better known as the Licence Art Libre, maintains recognition of the artist's rights yet provides additional opportunities for appropriation or other creative usage of the artwork. This license in relation to the Internet "also encourages a continuation of the process of experimentation undertaken by many contemporary artists" (artlibre.org, 2007). The license continues by describing "the basic aim of this Free Art License [is] to promote and protect artistic practice freed from the rules of the market economy" (artlibre.org, March 2007).

Although Open Source, Free software and Libre Software are different, this thesis mainly focuses on art works rather than primarily non-artistic software. Nevertheless is the question of importance whether or not these copyright mechanisms as tools or mechanisms assist artists in their participation. Even though Open Source or Free Software are constructed with the intent to increase development and innovation of technology, the concept of a community having free access to artistic source materials or building together on an artistic project can be as attractive to subscribers. As mentioned above, copyright mechanisms have been made available providing similar opportunities for artistic works. These mechanisms primarily fall under such provisions as the above mentioned standard copyright, Creative Commons License or the Libre Commons Res Communes Licence. It should be stated that the concept of something being software does not inherently exclude it to be an artwork in itself nor does it exclude it being an artwork-generating construct. One might think for instance of New Media Art, Net Art, Game Art, Software Art or initiatives made under *Pure Data*, or *Csound*, to name but a few of the many.²⁹

Besides the differences between Open Source, being more focused on methodology in innovating and working on software and Free Software having more of an ideological motivation of freely available knowledge to the collective, both the spirits of the licenses are applicable in artistic realms as well. Art can collectively or through sharing be developed for methodological purposes or rather for ideological purposes. These copyright mechanisms, if they haven't been already, should be equally provided for art works. Within certain Creative Commons Licenses, the Licence Art Libre and most certainly The Libre Commons Res Communes License one or other of these provisions have been consciously made.

Private property is of no central importance when seen through this model. The model, when shedding light on the actors and their licenses, shows that any private property

²⁹ An online source providing an abundance of examples might be: <http://runme.org/>

seems to be shunned. Looking at the struggle surrounding intellectual property through the LSM, the concept of the collective is highlighted. It is believed innovation and peer review stimulates and is stimulated by the collective availability to share, alter and add on to.

Decentralization is therefore essential and monopoly, as in singular control, is shunned. The level of originality can be minute though creation is built on the creation of others. So is it with creative works too. These works are intertwined with other works. Therefore a pool of publicly available works is essential. This availability is fostered within public domains, or more commonly seen here, certain forms of creative commons based on various licenses resulting in various copyright mechanisms.

Appropriation is allowed at this level. Liberties for the users are maximized to a lesser or larger extent depending on the liberties provided by the various mechanisms. These variations lead to fragmentation but are not necessarily seen as negative but rather as a possibility to tailor to the specific needs of a community or participants. That what has no owner is a source for interaction, participation and growth, that what is owned can be open for exchange. Anything that is common is a basis for productivity, and must be maximized. The maintenance of the creative commons is controlled through contract, and this is seen as a guarantee of the freedom to share, alter and add on across various generations of users as well as generations of the creative work. Individuals interact with the purpose to, as efficiently as possible, maximize innovation through collective work. Systems, processes, mechanisms and media are in function of this manner of working. Here, openness is essential. Following the actors seen through the LSM, the Internet and other digital technologies are such potential for openness and decentralized control, anything that could circumvent collective property, or the decentralized control thereof, seems to be approached with skepticism. Digital Rights Management (DRM) is utterly opposed as a tool and as a technology that promotes private (corporate) property.

1.6. The Environmentalist Model.

The Environmentalist Model (EM) is initially based on analogies as found within the articles by James Boyle, which he extracted from combining IPR with the environmentalist movement creating "cultural environmentalism" and "intellectual Ecology".³⁰ This Model is one in which an "ecological" balance is intended to be found between the CLM accentuating commodification and that of the LSM and its highlights shining on non-proprietary discourse. In other words, it makes for a model where proprietary content, through copyright, and free works, through copyleft, have their proper place in addition to a rich culture within creative commons and public domains by means of a more open interpretation of the Fair Use Clause and a limitation of the duration of copyright over time.

By mid-twentieth century, some considered an "ecologic crisis" was directly related to the newly establishing democracies (White, 1967, p.1204). These same voices have wondered if the developing culture within them is not simply self-destructive and whether survival can be guaranteed if the basic concepts, or as White calls them "our axioms", are not adequately rethought (White, 1967, p.1204). White was alluding to our physical environment and the ecological issues related with it. Today, a newly established and potentially "democratic culture" is possibly developing within the Internet, with its content and meaning, or more generally put, with its access to information (ibid.). The "ecological crisis", within this context and following the discourse of the EM, is also one threatening the intangible intellectual eco-balance. Back then, White was not referring to intellectual property and certainly not the dynamics and processes as they are developing within cyberspace, though her quote is still, or again, appropriate in the case of the model discussed here. When White speaks of consequences and "axioms" the author mainly refers to "Christian" concept that function as axioms of "conquest of nature" (ibid.). So too, consequentially, is there a conquest to mine and privatize intangibles, for what else is "conquest" but the actions: to seek, to seize, to win; to make something one's own?

³⁰ Essential articles are *A Politics of Intellectual Property: Environmentalism For the Net?* (Boyle. 1997); from the *Law & Contemporary Problems Journal: The Second Enclosure Movement and the Construction of the Public Domain* (ibid. 2003); and a 2006 Article in the *Financial Times: Cultural environmentalism?* (ibid. 2006). It should be noted that the concept of the ecological in relation to art has also been used by Paul Virilio in *The Accident of Art* (Virilio, & Lotringer, 2005, pp. 85-87).

This model does not accentuate privatization. Nor does it highlight actors that advocate simple categories as defamation, vandalism or theft. The actors highlighted through this model advocate for public, legal and political space containing both enclosed content as well as publicly available content. They speak of cultural space that is fertile with sufficient content to explore and interact with by equal communicative opportunities. It is a discourse yet little explored, debating more leeway, amongst others, for appropriatist artists, bricoleurs, creators of Pop Art, comedians, parodists, cultural activists, and cultural critics. This is a set of artistic participation mechanisms, which provide the processes to comment on the cultural environment though need sufficient resources to come from that same cultural environment. The unbalance supposedly comes from the dominant cultural movement increasingly pressuring the privatization of culture. Supposedly, this is making it more difficult for participants to react, built or critique on their own surrounding culture matrix, that, due to its proprietary status, is no longer theirs to use freely: songs on the radio or through podcasts, images on a billboard, advertisements within the Internet, etc. Within this matrix, property, can develop though should not be a limitation nor a justification for silencing cultural comments and innovations. Such comments and innovations, as mentioned previously, which have developed further through the Internet, consist of parodies, critiques, bricolage, cut and past, culture jamming, or "ganking". The latter is a slang term for cultural "borrowing", or in other contexts, "stealing" (Lydon, 2007). Again, the forbidden fruit status is given to a common cultural action, which did find its birth long before these times of digital media.

When looking through the EM, Boyle becomes a dominant figure; his concepts can therefore not be ignored when exploring the power struggle and when looking at these through the three models. Introducing some of his concepts with a quote is appropriate:

"Successful development could only proceed if it were sustainable; the environmental impact must be part of the analysis. Similarly, both nationally and internationally, we need to recover the traditional insight of our intellectual property laws; that it is not *rights* that generate progress, but the *balance* between rights and the public domain, a balance that is highly context dependent. One size cannot fit all." (Boyle, 2004, p.8)

Boyle suggests more. He offers seven principles which are appropriate to be implemented explicitly within the EM namely *balance*, *proportionality*, *developmental*

appropriateness, participation and transparency, openness to alternatives and additions, embracing the net as a solution rather than a problem, and neutrality (ibid. pp.8-10).

As explained in different formulations in the above paragraphs, Boyle promotes a *balance* between views, which are highlighted by either the CLM or the LSM (ibid., p.8). The privately protected material as well as material within the public domains or creative commons each have their proper place in the larger picture. Each way of looking at creative resources, creative incentives or liberties, provides potentials as well as limitations. Combining two ways is possibly maintaining a system that can *balance* out the negative sides of each and stimulate the positive effects of both. To Boyle it seems obvious that at present day the *balance* between public space and more specifically public domains and creative commons versus the private space, more specifically alluding to privatized culture, is tilting in favor of the latter. This results in a too high an importance put on the privatization rather than on a *balance* between privately and collectively available culture.

Efficiency lies at the core of Boyle's concept of *proportionality*. Legislation and effects need to be cost effective, and thus maintain a level of efficiency. Not only that, but also the benefits to the public, need to be maximized. Certain kinds of legislation, such as that concerning extensions of a copyright protection term, erase active participation through one's own culture, consequentially resulting in an disproportion and making the cost to participate too high compared with the benefit to participate by means of one's cultural environment.³¹ Boyle makes it clear when he writes "extending the copyright term retrospectively... denies a twenty year swath of culture to the public in order to benefit the tiny minority of works that are still being exploited commercially" (Boyle, 2004, p.9). Here Boyle refers to, for instance, the Sonny Bono Copyright Term Extension Act prolonging copyright somewhat less than a century beyond the life of the creator or of the moment of initial publishing of the work (Senate and House of Representatives, 1998; Hirtle, 2007).

The disproportionate result of the above mentioned legislative example has its direct effect on artistic forms of expression. Obviously, it needs little explanation that any appropriation (accidental or intentional) by, let's say, a documentary filmmaker of any urbanized environment, that includes images and sound generated by a previous creator, which is basically anything made by human hands, is conceivably protected and thus

³¹ Some participants use audio-visual, graphic, musical, body and other "languages" to get their message and social views across. Participation as such is not limited to an official national language, an economic nor a legal jargon as used during, for instance, a parliamentary plenum.

potentially illegally used³² within the audio-visual document of that period in time.³³ Even though, this might all be solvable through licensing and contract negotiation, it would be an odd world where it is common sense that a lawyer were needed to be consulted by an artist with every and each questions whether or not an artwork, or a cultural document can be made, a statement can be heard or read.

Boyle points out another issue of a majority of creative works that are no longer exploited commercially nor have a *known* proprietor. The above-mentioned extension results in the protection of works that no one claims nor anyone dares to use. The works are obviously protected, yet they generate no income. Here the term "protected" could be substituted by the words: "locked down". The protection of few cultural assets disproportionally locks down a big chunk of cultural resources.

These works are defined within this thesis as "zombified" works: dead, without any cultural soul, yet disturbingly (kept) alive. Though, within legal experts' realm, the latter kind of works with an unknown origin, are referred to as "orphan works."³⁴

Continuing on a next note that is within the context of exploring the EM a quote from Friedman is befitting:

"The fact that the final outcome generally must be a law applicable to all groups, rather than separately legislative enactments for each 'party' represented, means that proportional representation in its political version, far from permitting unanimity without conformity, tends towards ineffectiveness and fragmentation. It thereby operates to destroy any consensus on which unanimity with conformity can rest." (Friedman, 2000, p.840)

Very different opportunities and complexities can be found within Boyle's suggestion of *developmental appropriateness*. The EM gives the possibility to focus on the provision of a discourse that could "be a counterforce to the tendency to impose 'one size fits all' solutions worldwide" (Boyle, 2004, p. 9). This concept takes diversity into account. Klaus

³² It would be entirely illegal if there were no Fair Use Claus within Copyright Law provisions, and still with this legal clause available legality of certain uses is debated too. In addition, whether or not the usage is legal, fear, ignorance or lack of logistics create certain hurdles for secondary users.

³³ Boyle and his colleagues have made an artwork, a comic book, explaining this problem of copyright. Freely downloadable from <http://www.law.duke.edu/cspd/comics/pdf/cspdcomichigh.pdf> this comic book is a concrete example of an inversive variation of this thesis' central question: How can legal experts artistically provide discursive tools within the debate surrounding copyright mechanisms? Other such examples exist: a cartoon, *The Corruptibles*, on the dangers of copyright developments <http://www.eff.org/corrupt/>, an interactive textual auto-copying experience <http://www.manetas.com/iamgonnacopy/Copying.swf>, or a user license agreement busting at <http://www.illegal-art.org/contract.html>

³⁴ Legal information on these types of work can be found at <http://www.copyright.gov/orphan/> . The term orphan does denote something or someone "bereft of protection, position" though this protection is only from the point of view of the proprietor not of the point of view of users, culture, innovation or the artistic community as a whole.

Günther's *principle of appropriateness*, although used in a different context, befitting here too (Günther, 1993 in Delanty. 1997, p.54). This principle "argues that the application of a norm is independent of its justification and depends on what is appropriate in the given situation..." (ibid.).

Boyle sounds agreeable when mentioning the importance of *participation and transparency*. Legal experts, such as Boyle, argue the significance of civil society groups participating in debates for instance on copyright or IPR. He is clear when underlining the link between IPR and access to medicine, free speech and online privacy, all being areas directly influencing the lives of any citizen. One can concur that IPR thus shouldn't be singularly build by an elite alone. Participation is essential as it is participation that will maintain the activities within the public domains and as such add to a better *balance* as well (ibid., p.9). *Transparency* is created through participation. *Transparency* here means that mechanisms such as those related to copyright law must be open to the scrutiny of the public. *Transparency* can be achieved in at least the following three ways. (A) Copyright mechanisms might be constructed or restructured to become easier to be perceived or detected and consequentially be open to public scrutiny. (B) Having the information concerning the mechanisms online helps in the path towards *transparency* too. (C) By participating in the public domain through appropriation the artist is inevitably confronted with copyrighted materials. Mining for resources online provides the artist with various copyright mechanisms. The moment the artist might wish to use parts of works, each under various copyright mechanisms, the need to understand and consequentially the potential to critically observe or examine these same mechanisms might become indispensable and might be resulting in an autodidactic development towards *transparency*. *Transparency* is increasingly of the essence, because copyright, which is of main interest here, becomes increasingly more of a dominant force within the market, developing it into an information economy, and thus influencing (and should equally be influenced by) the public as well as the private spheres.

The Internet has spawned various reactions. Though, *embracing the Net as a solution, rather than a problem* seems to Boyle an acceptable way forward. The Internet provides the opportunity for collaboration over large social and technological networks though too many institutions, as well as proprietors and policy makers focus on the Internet's dangers of illicit copying. These same institutions can possibly and more importantly foster the network (ibid., p.10). Boyle's concept can be used as a steppingstone to return to the

thesis' introduction where the dangers of inevitable cultural and linguistic association through connotations and denotations, leading to generalizations and thus fallacies, were explored. It is an over-simplified solution to erase artistic participation by equalizing it with piracy or other criminal acts such as theft, organized crime, or terrorism not to mention that it seems to blur the distinction between civil law, to which property law belongs, versus penal law. This does not imply that any action is simply justified, moral or legal merely when labeled as "artistic", though the economic as well as cultural consequences, of not considering the possible need for nuances when distinguishing between legal, artistic, or illegal actions, are far more negative for the well being of a cultural eco-system as these might lead to totalitarian quasi-solutions of book burnings, iconoclasms, or other forms of violent cultural revolutions, which many have had, in retrospect, not simply the propagandized linear nor positive effects: they often, drastically and irrevocably, altered the cultural ecosystem of their time and of its future wish for preservation.

Policies surrounding IPR, or specifically copyright, should be neutral says Boyle (ibid., p.10). This *neutrality*, or impartiality should be guaranteed, no matter the copyright mechanisms used. Whether the choices are to opt for closed source, a choice which can be especially appreciated when looking at innovation through the CLM, or whether one looks at innovation through the LSM, and goes for open source collective approaches, both in fact aim for the same. Both can reach the same: innovation. If copyright is partly to motivate innovation, *neutrality* is thus essential. *Neutrality* in policy must be guaranteed as there is seemingly neither an argument for, nor one against that outweighs one or the other approach highlighted by any of the models. Actors can oppose one another as long as they are represented as equally worthy opponents in a public debate. Innovation, Boyle continues, implies needs for changing opportunities in finding alternatives, variations, additions and improvements. Various adequate processes equally stimulate innovation (ibid., p.10). Indeed, efficiency and economic incentives are two motivators for innovation yet not the only ones. As such it could be argued that *neutrality* should be used when other incentives for innovation are available too. One might think of religious, traditional, philosophical, or simply obsessive-compulsive incentives. Or, incentives might even be found in a need for acknowledgment, intellectual and artistic procreation, narcissism, identity and a need to communicate through non-conformist means, to name but a few. All might lead to artistic innovations, if not, innovation in general. The more neutral the environment is towards the kinds of catalyst for innovation the more a fertile ground might exist for it.

Boyle asks of participants, rather equally as Hardin has a few decades ago: "[more than] a technical solution [that] may be defined as one that requires a change only in the techniques of the natural sciences, demanding little or nothing in the way of change in human values or ideas of morality" (Hardin, 1968, p.3). Indeed a "change in human values or ideas of morality" seems to be requested (ibid.). Whether or not one calls it an "axiom", as White does quoted above, or a "human values" like Hardin implies, a change of the individual's mindset is essential (White, 1967, p.1204; Hardin, 1968, p.3). Shifts in techniques can be intertwined with shifts in such mindset. In the case of copyright, one could agree that the "technical solution" is that of the legal mechanisms.

Boyle uses his seven principles to suggest a shift within the current workings of the WIPO³⁵, a trans-governmental organization concerning itself with Intellectual Property Rights. Nevertheless, it could be suggested that these concepts can be extrapolated and could be looked at as general tools. Firstly, these concepts assist in understanding the discourse highlighted by models: the CLM, the LSM and surely the EM. Secondly, as Boyle underlines it in his ideas on *participation and transparency* and "civil society groups", to provide artists and others with the linguistic tools, in addition to the ones available seen through the first two models, with the intent to increase attention, and construct their utterances in strengthening their own discourse. Fittingly, Hardin continued, "the individual benefits as an individual from his ability to deny the truth even though society as a whole, of which he is a part, suffers. Education can counteract the natural tendency to do the wrong thing, but the inexorable succession of generations requires that the basis for this knowledge be constantly refreshed" (Hardin, 1968, p.5). Thus, Boyle wishes to "refresh" the WIPO's purpose, yet while consciously including "civil groups" and individuals within the process.

Following Hardin's argumentation even further one might come to a conclusion that creative commons, or public domains, would not be advisable (ibid.). Hardin is speaking of the physical world (water, air, land, etc.) and not of its inverse world, the world of ideas, hereby implying that the former ones are tangibles (water, oxygen and earth consist of more or less complex molecular structures). One might get away with it to reverse the discourse of Hardin's "tragedy of the commons" (ibid.). Hardin promotes that to maintain the commons, such as air, seas, and the national parks, stronger regulations and administrations should be implemented (Hardin, 1968, p.7). This, according to him, is the only proper way to maintain a somewhat sustainable future. It is indeed also applicable for creative works and the balance

³⁵ The World Intellectual Property Organization

between intellectual property and those works in the public domain or in the commons. Without getting into the specifics, Hardin's argumentation centers on the control and limitation of human population growth and access to resources. Creative resources are relevant to the cases here. It can be argued that for artistic or intellectual output Hardin's argument should be reversed. By providing the appropriationist artist a balanced freedom to access, the cultural resources increase qualitatively rather than impoverish.³⁶ By providing the pirates access, simply uncontrollable quantity increases. This is especially, though not exclusively, the case for cultural output that is available within digital media. Cases of this are provided in Part Two of this thesis.

It is not untrue to state that the appropriation (not piracy) of a part of a digital or digitized work, does not vaporize the work into oblivion, rather the opposite is true. Herein though, lies the fact that the CLM does not provide clear views of such extended freedoms, but rather provides lights on those actors that extend the freedom towards the dynamics of commodification, which, through that model, is completely understandable. And, it should be said that the creative commons (such as those under the Creative Commons Licenses, as opposed to the public domains) are not deregulated, which is also different from the commons Hardin is concerned about, but rather find their regulation for the maintenance and sustenance of the commons in the provided licenses. As mentioned previously, these licenses obligate the next generation users to keep the license of the makers, in addition to the freedoms for these makers, and additional space for the consecutive users. These are provisions regular copyright only provides in a limited sense. These are also provisions to which actors surrounding tangible resources only can be provided with as long as tangible "stock" lasts. This means, as mentioned above, that the artistic work within the creative commons (or similar licensing depositories) has to be kept available for others to study it, add to it, alter it, and distribute it further.

³⁶ Whether the *aesthetics* have increased is beyond the scope here.

1.7. Conclusions.

In this Chapter, three models were reconstructed to focus on particular elements of a convoluted cultural, political and socio-economic surrounding. What is the *cultural* environment and how is it intertwined with the political and socio-economic? When starting from the premise that "a theory of artistic creativity must describe a more general relationship between individuals and their cultural surroundings" (Cohen, 2006, p.146), it is possible to infer that such surrounding must have economic dynamics, legal infrastructures and political discourses to support it and simultaneously to be intertwined with. Additionally, picking back up on the above quote from Cohen, one could see that "our cultural surrounding" is, besides being intertwined with legal, economical and political mechanisms, also interwoven with religion, authority, and tradition. All these factors affect one and influence one in how to think of creativity and which source materials to use or not to use. The latter is highlighted in the cases, especially the one in Chapter Five, described in Part Two of this thesis. Decisive factors within the debates and power struggle can now be looked at through the three models. The Actors' struggle can be seen when given a clear picture of, for instance, the dominant and conformable, centralized and private control, in tension with a rather pluralistic or fragmented view but also with the third way of looking providing views on the means to balance the two previous ones together. Each model, by accentuating particular elements from the whole picture, provides a way to interpret how certain types of copyright mechanisms and appropriationist mechanisms are supported or dismissed within the struggle.

Some of these particular elements are described within the introduction of the thesis as well as in this chapter. The obvious element is of course piracy. Piracy seen through any of the three models provides across the spectrum, disapproval. Another one is participation, which is seen through any of the models as that of proprietors, authors and specifically users. The CLM closely focuses in on the consumer-user status as from a corporate view property ideally generates profit and profit comes from one or other form of consumption. Through the LSM, on the other hand, the user-artist is highlighted, and in the case of this thesis, specifically the artistic appropriationist, is shed a light upon. Collective projects can only be

collective if users³⁷ actively provide alterations on the creative work in question. The EM sheds light on a possible combination of the two. When searching for views on participation creative works are inevitably part of the picture. The CLM shows proprietary works, the LSM accentuates collective works into the forefront. The EM, again, gives both a proper place in the forefront.

As the models move such variations in creative work more or less out of the background, the way new works can come into existence is inevitably attached to the composition of the whole picture. Thinking of innovation, by means of the CLM, is essentially maximized by innovation going hand in hand with property. So too does innovation need creativity. Creativity can be appreciated in various ways: as individual, collective or picking from sources found in one's environment. Respectively these are highlighted through the CLM, the LSM and the EM. Maximization occupies the stage when analyzing the scene through the LSM yet, again, not through private property but through collective decentralized projects. It is obvious that the findings by means of the EM are no different: innovation needs to be maximized. Normative and ethical questions concerning the general concept of innovation and whether or not it should be maximized are imperative yet beyond the scope of this thesis.

The result of innovation is a work, or a product that is controlled through DRM, Digital Rights Management, a series of technologies that find their place in the view on works by means of the CLM. The LSM as well as the EM provide no such possible view on this type of solutions but rather show possibilities for minimized DRM. As such it is obvious that appropriation can have its place while looking at works through the last two models but hardly through the first model. If private property finds maximization seen through the CLM than concomitantly the public domains as well as the creative commons must seem to be diminishing. The opposite is true through the other two models, of which through the third one an eventual balance is found. DRM does not only close the creative work, it encloses it. It is thus tautological to say that the higher the importance of DRM, the more diminished openness is, and vice versa. Openness doesn't mean users have no responsibilities to take

³⁷ The difference between "user", "creative-user", or "user-artist" is amongst others one of aesthetics and acknowledgement depending on which model one chooses to look at these actors. Looking through the CLM the actor might more easily be defined as a user, or consumer-user, user-amateur, or even a pirate/thief. Seen through the LSM the same actor might also be seen as a user-amateur, but also more easily as a creative-user, user-artist or simply artist. Through the latter model the label of pirate or thief is not easily highlighted for obvious reasons that property is more easily perceived as collective rather than as private. In the CLM this is simply reversed. The EM could highlight any, though, due to the present day dominant accent towards private property and all its consequences, the model tends more towards similarities in views as accentuated through the LSM.

other participants into account, on the contrary, licensing, meaning an agreement to use someone's work or property, is in general important accept for works within the public domains.

For those works not in public domains, or those works under any license, a user still has the possibility to appropriate small parts under the facility of the Fair Use Clause. This method of copying small snippets of creative works is more or less pushed into the dark when viewed through the CLM, the other two models are far more favorable to see fair use as part of the picture.

Looking through the CLM, actors are shunning away from fragmentation and going for conformity towards one cohesive whole. The other two models reverse this pattern, of which the EM especially underlines contextuality. Efficiency lies intertwined with these previous terms. Efficiency observed through the first model leads to market efficiency, through the second to information efficiency and through the third one, to a balance of both. When efficiency needs to be reached control in various forms is more centralized when appreciated through the CLM and decentralized, or rhizomic³⁸, seen through the LSM. The EM pinpoints a view on control that is short-term in time and appropriate according to the context. Context is also clearer through the EM when it comes to regulations, though seen through the CLM as well as the LSM rather competing regulations seem considered to be more universal.

To simplify the models a schematic can be given providing some key terms within the struggle and what is seen when looking through one or other model. The key terms focused on here below are: piracy, participation, proprietary works, innovation, DRM, appropriation, public domain(s), creative commons, creativity, openness, licensing, the Fair Use Clause, conformity, fragmentation, efficiency, duration of control, and regulation. The terms will mainly be dealt with in terms of being maximized or minimized depending on the model used to look at the term (and its implementation in relation to artistic works, copyright, etc.).

³⁸ "Rhizome" means "a continuously growing horizontal underground stem that puts out lateral shoots and adventitious roots at intervals" (Hanks & Pearsall, 1998). "Rhizome" is used as a metaphor for a network of actors that are related with one another in a way certain plants spread rhizomically, such as strawberry roots do or ginger roots. The connecting roots can be severed yet the plants are still related, continue to thrive and even spread. The metaphor is meant as can be found within Deleuze and Guattari's *A Thousand Plateaus* (Deleuze & Guattari, 1987, pp. 5-12).

KEYWORDS	Classical Liberal Model	Libertarian Socialist Model	Environmental Model
piracy	minimized	minimized	minimized
participation	user-consumer	user-creator	user-consumer-creator
proprietary works	maximized	minimized	in balance with publicly accessible culture
innovation	maximized	maximized	maximized
Digital Rights Management	maximized	minimized	minimized
appropriation	from commons to private	from private to commons	balanced, back and forth from both private, public and commons
public domain	minimized	not "free" enough	maximized
creative commons	minimized	maximized	administered in combination with private property and public domains
creativity	individual	collective	built on cultural environment
openness	minimized	maximized	maximized
licensing	maximized	maximized	in balance with public domains
Fair Use Clause	minimized	maximized	increased to balance
conformity	maximized	various conformities	contextualized
fragmentation	minimized	maximized	where appropriate
efficiency	market	information	market & information
duration of control	maximized & centralized	minimized & rhizomic	short-term & proportional
regulation	universal	universal	contextualized

The schematic is obviously not exhaustive, yet might provide an easy way among others to contemplate and participate within debates on the topic of creative works and copyright mechanisms. The models are useful especially because there is a growing set of user-artists working within the digital realm, such as the Internet. Looking at the processes leading up to their work or their finished product will be rather different depending on the model one uses. These differences and tensions become only greater when the processes observed are those related to copying and when these are consequentially questioned as valid series of actions. In the next chapter the tension is explored by looking at artistic appropriation, property and labor.

Chapter Two.

Artistic Appropriation, Property, and Labor.

2.1. Introduction.

“One reason the East German [playwright Heiner] Müller was never as well known in the United States as he was in most of the rest of the world was the nature of the challenge his work posed to received ideas of originality and intellectual property. Müller thought that the worship of originality played into the terrorism of fashion and the bourgeois cult of the absolutely new. Reinventing the world every day contributes to historical amnesia—an increasingly deadly malady in the info-age, he pointed out—and his response was to become the appropriationist par excellence of 20th-Century theater.”³⁹

Having arrived to this chapter we came full circle. It might be helpful to be reminded of the tension surrounding piracy and the organized crime’s or even the terrorist’s veil any form of copying might have received. Whether or not these comparisons are valid in themselves is an important question but besides the point now. What is to the point though is the association between the latter kind of copying, being piracy as an extreme and rather uncreative form, and other kinds has galvanized a dominant social dynamic into approaching indiscriminately any quality or quantity of copying, such as artistic appropriations of any kind, as maybe a criminal or at least an inappropriate action. It is arguably so that the consequences of this indiscriminate approach potentially diminish resources as well as diminishes mechanisms to express oneself through. A possible consequence could be a reduction of the public domains and an increase on the sovereignty of privatized cultural goods, coming from any political or geographical hemispheres or any specific ethnic culture. On the other hand, to name but one, it is valid to critically approach those same creative forms of appropriation with the question whether they are indeed to our advantage, and not simply damaging the private sphere by eroding control over private property. It is clear that actors want to protect their assets: tangible property, intangible property, and their social property (or status). Actors are thus motivated to hold their view on what the private or the

³⁹ Kalb, 1998, p.1

public sphere should look like, how this view should be transformed into actions, and how its goals should be achieved. Apparently each actor, within the power struggle, intends to diminish unfavorable alterations by other actors to that same private or public sphere. One of such sets that can be found to stand out in this struggle is the set of artistic appropriations.

The question, at stake in this chapter, is whether an appropriationist work is the result of theft or rather of a form of cultural creativity and innovation. Artistic appropriation in a broader sense of the word is of importance to this story. The central question being to what extent copyright mechanisms influence the artist's struggle during their participation within the public sphere is in direct relation with the action of artistic appropriation. Two of the three models shed a light on an approach that is more favorably. The other one, the CLM, accentuates opposition to the extent that freedom to appropriate could reach a level destabilizing the proprietor's dominion over certain parameters of particular kinds of property if appropriation comes without the proper compensations, the administrative (or contractual) protocols in place or without that same proprietor's consent. If one or other copyright mechanism legitimizes specific processes of working and makes others illegitimate it is concomitantly reflected upon the tools the artist legally has at her or his disposal.

If the debate were ever to be concluded at the commonly accepted stage that copying of any kind were illegal, when an artist hadn't compensated a designated proprietor, after having received that same proprietor's consent to use parts of her or his property within a method and for a certain purpose, agreed upon by the proprietor, then this would inevitably and drastically modify the public sphere, its commons and its public domains. It is feared by those whom prefer looking through the LSM but especially the EM that these latter spaces would arguably no longer exist, or at least exclude one's own culture of one's own socio-cultural eco-system. If the debate were to dismiss the necessity of the previous then the private sphere, but more specifically the control over privately owned cultural property, would be drastically altered. In, fact both extremes are already intermeshed as much as the public sphere is interlocked with the private realm (Habermas, 2000, pp.141-142). Therefore it might be more appropriate to strike an agreeable balance between the previous two and not only find an overarching way to make as much the private property, or the commons, as well as the public domains flourish, but also to account for the needs of creators, proprietors, users and their common or overlapping environments. The previous mentioned is not limited to one's locality but is rather boundlessly intertwined on a global level. To shed a light on this simply think quickly of a song produced in New York, containing ethnic samples from a

community in Papua New Guinea and broadcasted from a radio station in Brussels while picked up by a Columbian documentary filmmaker interviewing an Indian artist listening to it over a podcast in Kyoto and partly appropriating it into a composition depicting her auditory experience of that moment in her life.

Although appropriation might be widespread the dominant discourse often apposes it by means of various actions. Discourse cannot be ignored when looking at copyright mechanisms and how these influence the artist's struggle when participating within the public sphere. Again, it should be reminded, the blurring of appropriationist work with piracy is a result of *discursive* actions. Therefore a closer look at the discursive actions that can be taken by the actors is useful. This will be partly the focus of this chapter.

Firstly discourse is explored for how it can be understood throughout the debates here at hand. Consequently a closer look is taken at artistic appropriation and how it intertwines with essential concepts to any of the three models introduced in chapter one. These concepts are labor, property and artistic participation, the latter for instance in the form of artistic appropriation. The first steps are taking towards a presumed tension between labor and appropriation. To start off an analysis is mainly based on an essential historical resource, being that of Locke. Locke is fundamental as his concepts, even though dated, are still quoted within the debates surrounding property, or here specifically cultural property (Locke, 1690, Chapter V Section 25-51). Locke's concepts, surely improved upon, still are core thoughts in the struggle between actors, looking at copyright related issues, while each is looking at it through one or other of the competing three models.

Then, added on to this, by means of concepts from Hardin, the commons are discussed. Fiske is mentioned when underlining the importance of the users, such as appropriation artists and their participation. Rounding this off, short reference is made to Habermasian thoughts on the spheres, which are given a place in relation to the discussion concerning artistic appropriation and labor. These, obviously amongst others, influence the constitution of the spheres Habermas describes. In the last part artistic appropriation is associated with variations of itself, such as music borrowing, and other mechanisms. Appropriationist mechanisms are also looked at through metaphors and analogies from history. Comparison is introduced with Dadaism and few concepts handpicked from such thinkers as Bourdieu.

The purpose is to provide the readers themselves with mechanisms to place artistic appropriation, and its variations in a larger context and as a main feature within the three models influencing the participation of artists.

2.2. *Discursive Contextualization.*

Following some of the polemics it seems that piracy has been influencing a mode of thinking and feeling in human actors. They, on their parts, influence the concept of piracy as well as to how it is perceived again by others. The anecdotes given in the introduction to the thesis, speak for themselves. If a pirated creative work is sold in the open with a flair of conformity within an exclusive shopping environment frequented by people whom represent countries or multinational corporations, it might emanate an atmosphere of acceptability. The discourse opposing the sales and the purchase of pirated films or music is at the moment of the business transaction temporarily derailed. If, on the other hand, as through the above-mentioned media it is described as criminal, it is perceived as highly unacceptable.

Why is this of importance? It is convincing that these intertwined influences create certain utterances which, in themselves, are part of complex discourses and vice versa. One or other discourse has a “determining effect on the way that individuals think and express themselves” (Mills, 1997, p. 8). A discourse is “a regulated practice which accounts for a number of statements” (ibid., p. 7). Tautologically, that what is regulated implies a level of control and a number of rules providing freedom from, freedom to and prohibition of something. Some oppose what others control. That what some consider an inappropriate prohibition is a freedom from something for others, etc. Thus a power struggle is created which can be observed, for instance, within the public sphere. The power struggle is obviously not only in relation to piracy, nor is the discourse, which is important here, only about piracy. The various tensions and the inner workings of discourses applied within the struggle are convoluted and need further attention. These inner workings of discourse are called “discursive mechanisms” (Foucault, 1981; Mills, 1997; Fairclough, 1992).

The competing models and their accentuated copyright mechanisms are interlocked with Foucauldian “discursive mechanisms”(Mills,1997, p.67). The discursive mechanisms are intended to strengthen the arguments and gain a better position within the power struggle. The mechanisms are references to actors, on the one hand, in their intent to maintain themselves and their discourse in rotation, and secondly, exclude the competing discourses from their preferred discourse. The mechanisms function multilaterally. The ones described here are: *commentary*, *discipline*, *rarefaction*, *ritualization* and *intertextuality* (Foucault and Fairclough in Mills, 1997, pp. 67, 69, 70, 71, 154). Although, every actor can potentially use all mechanisms nevertheless, those actually used, the way they are used, and the effects of using them are drastically different. The dominant discourse uses mainly the CLM to look at copyrighted materials and appropriation. The legal provision is mainly supportive of the dominant discourse, being that of the proprietor, and thus less of the appropriating artist. The main institutions follow established discourse and thus support those actors mainly using the discourse accentuated by the CLM. Opposing discourse is growing and highlighted through the LSM as well as the EM. Especially the digital networks are determinant in the growth and dissemination of the opposing discourses. With these oppositions come variations and shifts from the dominant copyright mechanism, such as those mechanisms under the set labeled as copyleft.

Some mechanism, discussed by Foucault, might not be included here, and he might not have defined the latter two specifically as mechanisms, these are however, partly following Fairclough, here assigned as such. The discursive mechanisms are of importance because thinking and communication “only become meaningful within certain pre-established discourse” and this discourse follows the previously mentioned discursive mechanisms in flux (Torfing, 1999, p. 84).

Mills makes the mechanism of *commentary* clear: “Those discourses which are commented upon by others are the discourses which we consider to have validity and worth” (Mills, 1997, p. 67). As mentioned in the introduction one can also find peripheral discourse commented upon and supporting one or other mode of thinking. It is previously claimed that the discourse surrounding piracy is one of them. This discourse validates IPR. Thus it validates copyright, and it validates property. In turn, concomitant with the need for and to supporters, with the right to property comes commodification of tangibles as well as intangibles. It implicitly validates justification to induce and have fear to trespass on someone else’s property. Whether it’s a piece of land, a logo, or creative works picked from a medium

such as TV, billboard, a website, etc, the fear is identical, the property is not. Cultural property and culture commodified into private property, are predominant elements entering our environment yet are not reciprocally nor equally accessible on a communicative level, by consumer-citizens, of which artists are a subset. As Foucault puts it, these commodities and their proprietary status “give rise to a certain number of new speech acts which take them up, transform them or speak of them... [T]hose discourses which, over and above their formulation, are said indefinitely, remain said, and are to be said again” (Foucault, 1981, p.57). The medium, ideal for commenting, is not singularly verbal. Tautologically said, it can be any intellectually or artistically imbued medium. Yet, as for one, when the fear factor is absent, *commentary* can be given more freely by those whom own that what they are commenting on, than by those whom do not own it. The commodity, its status, as validly being a commodity, and its discourse are as such kept in circulation. Non-compliant discourse, such as that opposing specific copyright elements of the commodity in question but also that opposing, let’s say, copyleft, will consequentially have a reduced circulation within that discourse excluding the other or excluding certain of the other’s convincing parameters. The discursive mechanism of *commentary* is of importance to how the struggle is experienced surrounding the copyright mechanisms but also how artists feel free enough to use preexisting artistic and intellectual works as source materials or not. The reason for this is because it is *commentary* that “serves not only to ensure that certain texts will always be in print, will always be taught in educational establishments and will always be worked upon by researchers, but it also makes it very difficult to institute the analysis of those texts about which little has been written” (Mills, 1997, p.69). Although one can follow Mills’ argumentation it does fall short in underlying that even within these institutions negotiation and struggle do exist. There are for instance educational institutions providing alternatives to commercial software packages by means of providing education about and with non-proprietary software solutions.⁴⁰

Discipline is another such discursive mechanism, which one can see at work within the struggle surrounding copyright and the question how copyright or variations thereof provide sufficient processes for artists to participate. This discursive mechanism defines what can be done and what cannot. *Discipline* defines that what is an appropriate action and that what is not. Simply said, it defines what is “factual or true within a given domain” (Mills,

⁴⁰ Various educational institutions including Wake Forest University, the University of Washington and Vanderbilt University have been praised to have migrated or switched to open source systems. More on this can be read at <http://opensource.sys-con.com/read/271223.htm> (last retrieved April 2007)

1997, p. 69). According to Mills it is a mechanism excluding more assertions, forms and content than it includes (ibid.). It should be noted that the number of actors following the dominant discourse are most often higher than the excluded number of actors. This, however, does not refute Mills statement. Becoming aware of the fact that dominant discipline excludes a high number of various alternative disciplines opens opportunity for search and innovation through alternative means by thinking outside the box. It is as such powerful within the debate surrounding copyright mechanisms and artistic participation because by means of this discursive mechanism opposing participants, or participants subscribing to incompatible models will simply disregard that what is incompatible, even when it might be valid from let's say, legal points of view or free-market angles, community or traditional artistic techniques. That what falls outside the *discipline* is considered to be untrue, not aesthetical, not viable, inferior, transgressive or simply illegal.

Fitting within the *discipline*, within the “disciplinary structures”, means that it is possible; that what doesn't fit, impossible (ibid, p. 69). It is a mechanism that “determines how data is classified” (ibid, p. 70). From *discipline* specific demarcations and methodologies are decided. Copyright mechanisms demarcate, within certain areas and possibly in a fuzzy way, what kinds of rights the author has or hasn't, what the control is the proprietor has or hasn't, what is acceptable and what not for a user to embark in. For instance, the Open Source philosophy allows for the author to be credited for the work, though strongly limits if not completely dismisses the validity of control of any proprietor over creative works and provides extreme freedom from these limits which could otherwise have been imposed by a proprietor onto a user, limiting the latter to not make the open source into closed source, or proprietary products. A commercial and proprietary product demarcates the control over time of a copyright as far as possible into the future. As mentioned before, proprietor's lobbyists successfully have achieved this in the US by means of the extension of the copyright term to approach close to ninety years (give or take a decade). Though one might wonder whether such initiatives as the promoting of a hardware-software combination based on open source and alternative energy resources such as Nicholas Negroponte's OLPC, One Laptop Per Child, is an example of a successfully combining of various seemingly opposing disciplines. The latter individual and his projects are intertwined with academic, corporate as well as open source interests, which seems a balanced approach between views highlighted by the CLM and the LSM; possibly a befitting case falling within views accentuated by the EM.

Rarefaction is considered a mechanism of imposing constraints. What is meant is that in theory an individual could utter, or communicate an infinite number of linguistic constructions. According to Foucault and Mills it turns out in practice this does not happen and the utterances remain “repetitive and within certain socially agreed-upon boundaries” (Mills, 1997, p. 70). When expressing themselves, individuals tend to maintain similar topics phrased with a set of reoccurring word choices. The latter is driven by the environment’s, and the individual’s norms as well as the created dynamic between the participants. Supposedly, this limitation is not only one based on norms but also one guided by “desires and needs” (ibid.). Although, it is partly the individual’s self-imposed restriction, the communicative dynamic and the social role the individual has taken on, the image of the individual within the communicative dynamic prohibits or rather increases the hurdle to use particular utterances and thus the individual applies a specific discourse. It is convincing however, that these hurdles and prohibitions, which might not entirely be lifted, could though shift. In association to our topic here at hand alternatives to the dominant view on copyright, its implementation or the dismissal of that implementation, coming from non-legislating participants, such as artists, might be influenced by such mechanism as *rarefaction* though are therefore not stagnated, doomed to fail nor automatically a recipe for success because of it. On the other hand *rarefaction* does have its influence in such that it intensifies the struggle or the debate and that it increases the hurdle (or fear) to engage in something that is discursively unacceptable or considered impossible (ibid.). To be able for an artist to enter into the debate, according to this mechanism, he or she has to satisfy certain conditions, if not, access into the discourse is not granted. Bluntly put, if an individual considers her or himself to be an artist by means of pirating a creative work, he or she will have chosen, for the sake of argument, a quasi-impossible mode of communication. Piracy as a presumed artistic utterance, and for it to be actually seen as artistic, and as such enter the discourse of the “artistic” would be indeed a very difficult, yet possibly intriguing struggle (that is, in relation to its motivations, reception, etc.). In this case reference can be made to the tension that is created due to a blurred distinction, as implied in the introduction, between piracy and artistic appropriationist decisions, and such as implied in the opening quote on Müller. Foucault from his part, understands that these discursive limitations are “sanctioned by an institution” and what is useful here is the effects limitations have, such as limitations through concepts of property rights, or author rights, or user rights, on specific forms of artistic expression (ibid, p. 71).

The fact that certain types of utterances can be made by a limited number of people is due to the fact that discourse is ritualized. This is a mechanism designated as *Ritualization*. In the case here it means that copyright is a legal concept referring to a process in which a court might need to intervene and decide on the legality or illegality of the action in dispute and this in relation to an assumed infringement and the denial thereof. This veil of rituals specifically assigned to an institution, such as a court, or a legal department, is part of a power struggle as well. Certain artists might refrain from certain actions simply due to the authoritative aura and a potential confrontation with these institutions, through for instance cease and desist letters, which are endorsed to use the revered rituals. So too is the *ritualization* discourse a qualification and a “fixing of roles for speaking subjects, the constitution of a doctrinal group, however diffuse, a distribution and an appropriation of discourse with its powers and knowledge...” (Foucault, 1981, p. 64, in Mills, 1997, p. 71). *Ritualization* is a regulation of discourse. It is therefore important when observing a struggle where for instance artists push against the boundaries of what is legally or aesthetically accepted. Alternative copyright processes as well as yet unaccepted processes of artistic participation through appropriation, are in themselves rituals competing with more established ones such as the law as it is known, or such as revered art works, or famous and thus clung on cultural property, such as a pop song, a cartoon figure, etc. That what is not part of the ritual is not sanctioned. That what is not sanctioned is pushed towards the illegal, the illegitimate, the immoral or the unaesthetic. As such art passes through various filters of *ritualization*: legal, social, economic, moral, and aesthetic. Ratification of the artwork or the methods with which it is made happens when it successfully has passed through the previous filters or when it successfully hacked the necessary filters into a shifted state. When it does not pass, upheaval is feared, shock or scandal is declared and debate commences or continues. As such the artwork has a larger function than simply pleasing for the senses, besides that it, or a part of it, for instance, becomes a process or a catalyst for debate. Copyright mechanisms assist, depending on a multitude of the previously mentioned factors, as inhibitors or catalysts in this process.

Intertextuality is that mechanism that directs the attention to the tendency of a text to refer to other texts, to that extent that the text is even regarded to be constructed simply by reference to other texts (Fairclough, 1992 p.103 in Mills, 1997, p. 154). For instance, defending the status quo of current copyright can easily be achieved by referring to existing texts: codices, acts, guidelines, conventional treaties, preambles, statutes and so on. Indeed

the list of available vocabulary for the genre of texts are in themselves impressive and setting a tone. Newer or shifted views might be thought of having less options to be supported by *intertextuality*. It might be thought that *intertextuality* is increased when the amount of referenced texts increase. Though *intertextuality* is not simply limited to texts dealing with the same topic, it is rather a mechanism by which any text can “transform any previous texts and restructure existing conventions (genres, discourses) to generate new ones” (ibid.). Contested artistic tools and mechanisms, such as appropriation could have a similar effect of restructuring existing conventions and consequentially generate new ones. Not only within the abstract set of artistic tools and mechanisms, but also on the level of the reference artistic appropriation provides when parts are taken from various works to create an appropriationist artwork. As such an artistic process, as appropriation, stimulates a hyper *intertextuality*: power relations are created amongst the texts, potentially referring to one another into a quasi-infinite rhizomic network.

The discourse, discussed within this thesis, is filtered through one or other of the three models, which themselves shed a light on, filter out, or differently put, include and exclude, specific tools, techniques and series of actions to go through. For instance, when looking at copyrighted material through the CLM certain appropriationist mechanisms are not considered valid disciplines, are not part of the ritual, and are not sanctioned. Through the LSM certain commodification or privatization is not sanctioned. Seen through the EM the extensive degree of privatization is not sanctioned. Appropriation, could be used as a general overarching term for a set of techniques, if only taking the artist’s skill in direct and singular relation with the resulting art. Appropriation can rather better be seen as a set of mechanisms, when one is considering the interlocking of skills (or techniques), the artist, the artwork, etc. with various institutions and power relations. It is already established that to this set belong, for instance, cut and paste, collaging, but also recontextualizing, borrowing, etc. These might result in such cultural objects, or artifacts, as an objet trouvé, or a cantus firmus, a DJ recording remix, a theatre parody, a graphic bricolage, and so on.

Thus, rephrasing the sentence at the start of the previous paragraph: the three models are shedding lights on, or are filtering out various mechanisms, such as artistic, or appropriationist mechanisms, as well as discursive mechanisms. The convolution goes further in its intricacies. Although, it could be argued that discourse is simply limited to a realm of linguistics and that appropriation, being actions of some sorts, must therefore fall outside of the discursive realm. At first sight the latter might seem true and though not denying

“appropriation’s” status of being an action, it simultaneously implies a set of techniques as part of larger mechanisms directly related to textual reference, and with “textual”, as Derrida puts it, is meant *any* possible referents. (Derrida, 1978, p. 148 in Torfing, 1999, p. 94).

Therefore appropriationist mechanisms can be considered discursive. It is one using its own grammar. It is a discourse not simply produced as spoken political rhetoric or daily utterances or as one that has been in its entirety sanctioned by a majority of institutions, such as schools to name but one.⁴¹ Appropriationist mechanisms are thus intertwined with discursive mechanism; one potentially becomes the other in a never-ending story.

2.3. *Ephemeral and Eternal Labor.*

Relating Appropriation with labor and property needs a few reiterations on how artistic appropriation has been defined up till now in this thesis. Artistic Appropriation is implying fragments taken from one previous work of art and moved into another artwork. The artist takes possession of, also referred to as “borrows”, pre-existing forms. The pre-existing forms can be artistic, intellectual, a result of an expression by others or of the artist’s own work or any material in any shape, style or form. Although one might like to think it’s clear, the line between appropriation and downright stealing is ambiguous and thus contested through debates. This contest has at its basis established ideas on what one can come to possess. Quickly stated, and later further explored, possession according to many is obtained through exchange, for instance, of (A) labor resulting in an exchange of assets such as an individual’s attention and physiologies, through time and the energy spent, in return for goods, or financial compensation as an intermediate towards goods; or of (B) gifts, which is an exchange of goods for social capital (such as friendships, or other relationships). Is appropriation one of those?

Concepts related to such struggle, based on the tension between labor and appropriation, are mainly explored here. As a linguistic steppingstone in this exploration of

⁴¹ Obviously, these institutions do sanction very specific forms of appropriation within the set scope and protocols of these same institutions intertwined with its larger socio-economic environment.

the concept of appropriation it is useful to investigate the term “appropriation”. Denotatively it refers, on the one hand, to “property” (implicitly connecting an action or work with possession) and “proper” (implying morality, and legitimacy) and on the other hand actions surrounding the “taking without permission” or a pejorative view on an action integrating preexisting parts of artistic work in a successive work of art (Hanks & Pearsall, 1998). Of course, it is arguable that “taking without permission” is necessarily pejorative, as certain kinds of “taking”, which is noticeably and strongly debated, need no permission (or, according to some, should not need it). A question in analyzing this struggle is concerning the way in which the concept of labor fits into the mix of artistic participation. Another is whether appropriation can be seen as a form of labor. A last one could be how labor is related to copyright and to the models through which the artist’s struggle is analyzed.

Although more complex than explored, it suffices for the purpose here to state there is a tension, on the one hand, between the concept of labor and on the other hand, the perception of appropriation. Appropriation is (close to being) seen as an immoral act as it takes bits and pieces of that property without the explicit consent of the proprietor or without any financial compensation. Seen from a Lockean point of view and through the CLM (which highlights the latter stance or the neo-Lockean stances), labor is linearly related with what it considers a “natural right” to property (Locke, 1690, chapter V). The appropriationist artists go against that “natural right” as they make (a part of) something their own, which (in its totality) is someone else’s and thus not their property to labor with, labor on, or produce fruits from. It follows that, if labor leads to property, appropriation cannot be categorized within this stance as a form of labor, at least not a legit one. Looking through the other two models, the LSM and the EM, makes it possible to contest this.

Seen through the CLM, appropriation is, simply said, definable as theft. It is wrong to enjoy the products of what one has “stolen”, thus, linearly and very simply: appropriation is immoral and, according to interpretation of the law, illegal. The Lockean point of view, and any views resulting from filtering through the CLM, go hand in hand.

There is more to the tension. Locke states that besides obtaining property through exchange in various ways, as already alluded previously, one could, simply put, obtain it by means of labor. He is mainly referring to laboring the land. Although, He does discuss some finer details and variations, in fact, one can designate the fruits of that labor as one’s own property. One such exception could be when one works for hire, as certain authors of

particular artistic works now do when signing contracts with proprietors, such as culture-producing corporations.

It is safe then to deduce that if one has not labored one cannot designate anything as property, in fact there is no fruit resulting from any labor. Even if one were to give and receive gifts there is an implied labor on a level of social networking, social skills, communication skills and other logistics needed to maintain relationships. If thus the CLM and the Lockean view are to be united, appropriation cannot be validated as a form of artistic labor, let alone labor in general.

Depending on the model used to look at it, one might define “artistic appropriation”, in itself, as a member within a larger set of labor, or not. Now, if one does *not* define “artistic appropriation” as a member of the set of labor, and as being a series of actions, which, when established are designated as mechanisms, than the word “artistic” in the term “artistic appropriation” is, if not a contradiction in terms, at least misleading. This is because if that what is “artistic” is sanctioned as being “artistic”, seen through the model highlighting “appropriations” as series of actions that are *not* sanctioned or not established, one or the other must be compromised in its given status of being or not being sanctioned or established. If an action, seen through the physics of any action, is not less or more a form of labor than any other action within a series of actions that require human attention in combination with human physiological forces, than there must be additional elements making the status, of not being sanctioned, a valid one. Within this combination, one such element is morality. Morality is added to the mere physics - and a qualitative evaluation of art follows a discourse loaded with moral judgment - the exclusion of those “artistic” series of actions, based on the assumption these cannot be considered to be “artistic”, must be a moral and arbitrary judgment rather than a detached conclusion. Or, in other words, the exclusion of one or other series of actions from the set of artistic or non-artistic actions is based on discursive mechanisms, which strengthen the power position taken through the discourse at hand (Foucault, 1981, in Mills, pp. 67, 69, 70, 71, 154). The discourse at hand with which its users support the dismissal of *artistic* appropriation, is one highlighted by one of the models, namely the CLM, and if the licenses as provided under copyleft are not followed, probably to a certain extent also by those looking through the LSM. As the EM balances the two, it would result that to a lesser extent no entire acceptance of an unrestricted artistic appropriation would be acceptable. Artistic appropriation, seen through the CLM, must therefore belong to

another set, an immoral or inferior set: regressive⁴², transgressive⁴³ or criminal. If appropriation is criminal it is because it invades the aforementioned principle of property being a “natural right”.

As such it is almost tautological to mention that the discourse, highlighted through the CLM, concerning anything resulting from the action of appropriation does not receive the institutional recognition of being art, and is not property or is property of the owner from whom a third party actor has appropriated. Thus this third party actor, this user and possibly criminal, described through the above discourse is neither artist nor owner of something she or he created. In fact if it is not art yet it is something “created” what is it then? Discourse dismissive of artistic appropriation, is one with which its users see results from appropriation neither as result coming from artistic creative action. So, that what the appropriator has done is neither labored nor is it a series of action resulting in a valid creation. Similar to certain archaic discourse claimed that a son, or daughter born extra-maritally was not a valid child but a bastard, these appropriations might be considered illegal art, or what I define as “bast-art”. Nevertheless the child is still a child, well alive.

Highlighted through the LSM, concerning anything resulting from the action of appropriation does receive the institutional recognition of being art, as long the appropriation follows the licensing under which the appropriated works have been protected, and is not property of an individual but rather is property of collectives to which these artists with particular artworks subscribe. These collections of works are subscribing to particular user licenses forming creative commons, and those works outside of any license, forming public domains, that can be unified or combined through the artworks appropriated. Thus this third party actor is considered an artist, though most likely not proprietor or sole owner of the appropriated work. Discourse supportive of artistic appropriation is one, which its users see, results from appropriation and is as a consequence of creative artistic actions.

The discourse accentuated through the EM, concerning anything resulting from the action of appropriation (A) does receive recognition of being art, and (B) could be seen, where appropriate as property or as collective art works, as well. Thus, the third party is actually seen as an important party, a party of artist end-users. These end-users have access to

⁴² With “regressive”, “returning to a former or less developed state” is meant ” (Hanks & Pearsall, 1998).

⁴³ With “transgressive”, “a violation of accepted or imposed boundaries, esp. those of social acceptability” is meant. A violation specifically focusing on “art in which orthodox cultural, moral, and artistic boundaries are challenged by the representation of unconventional behavior and the use of experimental forms” (Hanks & Pearsall, 1998).

various works in private spheres, as private property and proper licensing practices, as well as through well-developed public domains and creative commons. When looking through the EM, artistic appropriation is indeed seen as a valid form of artistic labor.

It must be underlined that, even though Locke's concepts are often used, Locke never referred to *intellectual* property, thus neither to copyright, but rather was referring to raw land. This is problematic. When one claims the land, and one labors on the land, one can claim that land. It follows that altered through that labor, and supported by the tangible proof of the fruits from that land, it is considered as one's own property. The latter train of thought was initially referring to a human being and its subsistence but over time became more of a market endeavor as well as, within some discourse especially highlighted when observed through the CLM, insurance to individual liberties by means of exclusive control. This seems straightforward. From the exclusive control of property an opposing discourse rises against that what is not owned privately but rather is available through the commons.

Additionally, it could be argued that the "tragedy of the commons" strengthens a Lockean discourse (Hardin, 1968). The Lockean discourse speaks of a private appropriation of that what was previously held in commons whereas Hardin speaks if not of such privatization at least of strict measurements concerning proper administration of the commons (Hardin, 1968, p.1244). As, according to Hardin, common land would be exploited to the brink of depletion in addition to it being polluted, this supported by the argument that users want to individually gain as much from the land while sharing only the costs in common but not the responsibility. It is believed that, for all practical purposes, no one takes, nor is willing to take, responsibility. Therefore, it is argued that a sole proprietor would carry not only the fruits, and the resulting profits but also the responsibility to maintain her or his land in its highest pristine state as to guarantee a maximization of profit over time. So it seems but clear that once the land has been enclosed any actor claiming a part of that whole enclosure would diminish the size of the property and thus jeopardize the possibility for the same profit by the initial owner, through a reduced quantity of land. This, as through the CLM property is highlighted as a natural right, would be seen as a serious infringement.

One might think the consideration, of the commons as such, to be more of a discourse befitting an environmentalist ethic as could be found within the EM or the collective ethic seen through the LSM and opposing an ethic of the market and private property accentuated through the CLM. It is true that in relation to the tangible world of flora and fauna one might have come to realize that natural resources are not unlimited. One can

understand that limitless exploitation and pollution is neither good for that same fauna and flora nor is it good for current and future human civilization. Yet, when it comes to applying this to culture, creativity, and innovation, the tables might actually be turned. The appropriate environmental ethic coming from an EM is, in some cases, still regulating. This regulation is, firstly, to maintain a balanced property right, and to increase a creative commons. Secondly, this ethic also promotes shifts in regulation: reviewing and reassessing IPR on an international level which takes into account local contextualization, and variations in others, within such new media as the Internet. Thirdly, it suggests possibly some deregulation, for instance, to increase the public domains. Fourthly, through regulation this model wishes to allocate more resources within the creative commons and the public domain practically providing creative resources for artistic participation, which in turn strengthen the possibilities for public debate through creative means.

Now there's a possibility to return to the CLM and the Lockean discourse of natural rights. Is property in such a way a natural right, an untouchable, or a God's given right? Does intangible digital or digitized property have the same features as tangible property, such as land? If one wished to oppose the above train of thought, yet tried to maintain a Lockean view, it would only be sustainable the moment one saw appropriation as a form of artistic labor and its fruits as valid property or as a common good. It follows that this action of appropriation, as it was within the previous thinking, cannot simply be seen as a form of theft, or having an immoral nature, nor that it can be simply judged as being an inferior form of labor. The latter is so because it would be difficult to, if not absurd to, differentiate between superior forms of labor versus those being inferior, as one would have to wonder by which parameters the demarcation is decided upon. The question of superiority might be a moral one (see for instance above mentioned ideas on natural rights) but surely an aesthetic one which is a judgment primarily on that what results from labor, being, the art work itself.

In fact accepting appropriation as a valid artistic form of labor turns the Lockean relationship between labor, the artistic appropriation and even intellectual property into an unsustainable one. For one, it doesn't seem to condone claiming any part of any property that, tautologically, had already been claimed. Though, and here following is a fundamental difference to be found between tangible land versus intangible digital works: the digitized or digital artwork is not reduced in quantity nor is its quality in a dramatic state of decline when one (partly) appropriates it because the digital can be copied, the land cannot.

Granted, the latter is dubious, though there the responsibility doesn't simply lie within the hands of the appropriator but also within the citizen-consumer's, living within a symbolic environment and actively reinterpreting or re-working, the meaning of signs or imagery, as what has been defined by Fiske and William Fisher as a significant action of a "semiotic democracy" (Fiske, 1987, pp. 236, 239; Fisher, 2001). This concept of *semiotic democracy* implies appropriation through which the public sphere (with its creative commons and its public domains) actually can be strengthened by having the appropriationist artist express through an alternative language and decide on any degree of a shift in the meaning of a cultural work, or of an assemblage of various pieces of a number of cultural works. This kind of language is a language, albeit not a dominant one, through which participants, the appropriationist artists, co-govern the developmental directions of the public and private spheres.

An argument against Fiske, by some, could be that such *semiotic democracy* seems to exclude acknowledgement of a possible struggle involving highly dominant cultural power(s), and its (their) supportive political and economic model(s) – a hegemony. Fisher and Fiske can be given some leeway, without forgetting that consumer citizens, or cultural producers are neither simply dupes nor simply almighty; that these are not simply positions, but rather are temporary and even arbitrary and continuously negotiated and rearticulated. Also, although highly obscured when analyzing through the CLM, the main civil right standing out when looking at artistic participation through the LSM as well as the EM is freedom to comment on, critique and participate in one's own cultural environment in addition to choosing one's status of being a passive consumer of that same culture. The latter choice of status might also be instigated due to the uncertainties in what is legit and what is not, creating degrees of fear to participate, which would again be clear from looking at the situation through the CLM.

A distressing cliché is that of the swastika, which is foremost an ancient symbol and currently still widely accepted by millions as an important Buddhist one. It is also up to us, as participants, to use and interpret that symbol not simply impoverished by the Nazi regime and, surely understandably, by the regime's victims. Actually, one could argue that by reducing it to that singular meaning one would give a specific discourse a monopoly on meaning. A monopoly is a win-loose situation. In this case the Nazi's and their appropriation of the sign would have won. It is non-linearly also true that the victims have recognition of their suffering through the same symbol, in this case suffering, the state of being a victim and

the recognition of it, take the upper hand. The monopoly is quasi like a reinstatement of a virtual copyright on something that has been in the public domain since who knows when. On the other hand, as already implied, neither the European historical context nor the absence of its citizen's awareness of the Buddhist symbolism can be simply ignored.

The latter requires an acknowledgement of meaning beyond one's egocentric⁴⁴, individual, national and historical borders. So too, is it up to active participants not simply to reduce an art work to its derivatives, its rip-offs, its abuses, its over-usage or simply to the artworks which have (partly) appropriated it. The abuse, or use of a cultural object does not linearly nor irreversibly destroy its presumed initial meaning (a semiotic beginning that is debatably so). This is especially so when that same cultural object is transformed or formed within the digital realm. As an example, it is easier to physically destroy any tangible sculpture, due to its unified form, than it is a digital work dispersed on a global network, due to rhizomic way of dispersion . There is on this level, no quality difference in either media, the latter is simply somewhat more vulnerable in a different aspect than the former medium, or needs various approaches when it comes to property rights, Moral Rights⁴⁵, heritage and conservation.

One could go further and see such responsibilities shifting attention, towards pieces of art such as Edvard Munch's *Skrik* of 1893, or Carl Orff's *Carmina Burana* being popularized and reused, an astronomical number of times, to such extent that the works might have lost their cultural impetus, as some might be simply bored with hearing or seeing more of the same; to some others the repetitive reuse of the works might underline their cultural importance. Besides Fiske and Fisher, others have expressed similar thoughts in which users, or appropriation artists are metaphorically, or rather literary but then in an intangible sense, intertwined with other actors and become "the architects of their culture, building on what others did before them and shaping the world that will shape them and those who follow them. And through this practice of interaction and appropriation, they exercise their freedom" (Balkin, 2004, p. 5).

A range of people expresses talents in diverse forms and degrees, through a number of processes and with varying techniques. These variations intertwined with similarities are what make us innovative and creative beings. Expressions might come from individuals with

⁴⁴ "Egocentric" here is meant as "centered in or arising from a person's own existence or perspective" and as a form of "navel-gazing" in which one is "concentration on a single issue at the expense of a wider view" (Hanks & Pearsell, 1998).

⁴⁵ Moral Rights here is simply meant as in article 6bis of the *Berne Convention for the Protection of Literary and Artistic Works*.

certain social status, which is not necessarily that of a proprietor. It is also possible that such expressions come from people with a political or socio-economic conceptualization that varies from the dominant model. On another level these expressions might additionally be intertwined with a cultural environment that has a tendency towards, on the one extreme, pastiche, or bricolage and recycling forms of art (all such techniques are, in this thesis, collected under the umbrella of artistic appropriation), and on the other, one which values proprietary works and processes that maximize commodification. The former is a push towards the ephemeral the latter towards eternity; these two are themselves intertwined and negotiated into their opposite discourse. This ephemeral | eternity duality needs further explanation.

Firstly, eternity can be explained by means of an example. As seen from the following example, it is possible to realize that highly commercially successful copyright-protected cultural products do seem to use certain artistic processes that its supportive CLM seems to shun. For instance, *Scary Movie* is as well pastiche as it is a franchise: *Scary Movie one*, *Scary Movie Two*, *Scary Movie Three* and *Scary Movie Four* with all their trinkets and collector items such as masks, and t-shirts to name but two (Wyens, & Zucker, 2000, 2001, 2003, 2006). *Scary Movie* is itself quoting *Scream*, which also comes with various follow-ups (Craven, 1996, 1997, 2000). This example is one of a highly commercial piece of property spread over a long period through high-end marketing and sequels. In film terms, and thinking of the almost century-long copyright such product(s) can enjoy, one might arguably state that this is, if not an attempt towards it, eternity.

Secondly, concerning the ephemeral the following can be said. The above-mentioned artifacts are, as a set, an example of how our creative output is influenced and taken from its own cultural environment. The latter is made clear through the following quote: “We respond (as artists always have) to our environment, an environment increasingly filled with artificial ideas, images, and sounds. Just as Negativland liberated their sound sources from a fixed context, [or as] the Dadaists gave letters, words, and sentences a new kind of freedom. These activities were similar to a critical practice that French theorist Jacques Derrida would call deconstruction fifty years later” (McLeod, Kembrew, 2004, p. 124).

Popular culture, such as the above sequels of film, but also such concrete TV examples as the *The Simpsons*, and *South Park*, extensively quote short and transient snippets from other cultural resources. Storey follows an argumentation that “popular films which ‘quote’ other films, self-consciously making reference to and borrowing from different

genres of film... [provide] a shared pleasure of intertextual recognition, the ... play with narrative conventions” (Storey, 2004, p. 160). These creative works and their appropriation, or in another word, these works of “bricolage” and their users, or audience, as “knowing bricoleurs” sway through the culturally appropriated bits ephemerally; each snippet passes quickly and literally is from and goes back into the past. This snippets, if ever so shortly, are no longer dwelled upon, there is no holding on eternally, no extensive looking back; there is no space for a “passivity of nostalgia” (Collins, 1993, p. 248; Brooker & Brooker, 1997, p. 7; in Storey, 2004, p. 160).

Property is a tendency towards a monopoly, and towards eternity. Appropriation is a tendency towards the ephemeral, the non-monopolistic. The monopoly on cultural property potentially holds a danger to create a form of cultural passivity, or a semiotic zombification, whereas appropriation, might to some emit an odor of pirates, nevertheless blows, rhizomically, fragmentations of life into cultural assets (Deleuze & Guattari, 1987, pp. 5-12). The eternity of property is especially accentuated while looking through the CLM at creative works. The ephemeral is highlighted through the LSM. Both get there are put in the foreground seen through the EM.

2.4. Analogies and Metaphors.

Before the twentieth century appropriation can be found under various labels, with various intentions and in various degrees. For instance composers throughout the past centuries used various appropriationist mechanisms. One simply has to listen to Beethoven to hear references to Bach. One such example is “the finale of Beethoven's Piano Sonata in F Major, Op. 54, referring to Bach's Fugue in E Minor”(Burkholder, Giger & Birchler, 2003). One of Bartók’s sources was Beethoven. “Beethoven's Grosse Fuge for String Quartet, Op. 133, serve[d] as a model for Bartók's Sixth String Quartet with parallels of meter, dynamics, articulation, use of rests, and compositional procedures. It is clear that Bartók deliberately used many of Beethoven's compositional techniques” (Burkholder, Giger & Birchler, 2003). These artists used appropriation, metaphorically labeled as “musical borrowing”, “homage

to”, “pay tribute to”, or “quote”. It is already established that appropriation is not only a music related phenomenon, it can be found amongst the Dadaists, Surrealists, and the Fluxus movement to name three streams of the last century.

Appropriationist forms of art might be seen as a present day Dadaist movement. The analogy goes at least as far as the similarities in the mechanisms used. One might see the struggle concerning copyright, the maximization of intellectual property within a global context and the influences on minorities, ethnic groups and various cultural assets to be commented on by today’s artists and labored with by the same through forms of appropriation. Although the appropriation artist might not actually consciously make the analogy with Dadaism, the actions are similar. As Edelman summarizes it, at the beginning of the twentieth century, the Dadaists reacted against several established values of their time: bourgeois, capitalism, and common sense: “ [The] Dadaist paintings can represent the repudiation of capitalism and bourgeois culture or the absurdity of twentieth-century human existence or nothing at all. It nonetheless remains true that works of art are the essential catalysts of support for a course of political action, and sometimes for several (perhaps contradictory) courses. They provide the images that enable many individuals to become part of a politically conscious group and that shape and justify policy initiatives.” (Edelman, 1995. p.9).

Appropriation and its variations can also be seen as forms of “emancipation” from a fixed artwork. This emancipation from being fixed isn’t only its own form, its medium, a potential semiotic stagnation, or a cultural zombification but also from its status as property and into an open status of cultural resource (Bourdieu, 1983, p.31). In addition to the initial work, the resulting work, as a consequence of appropriation, converts the common sense or the dominant form of the initial work. Appropriation here is synonymous with “repeating and reproducing it in a sociologically non-congruent context”(ibid.). Note that “non-congruen[ce]” looking at its latin origins, non-, -ruere, and con-, means something like “not fall together”. This term is related to concepts of fragmentation, or of variation. Taken the previous into account it becomes useful to quote Ashton who speaks of a “breakdown of established categories” (Ashton, 1969, p. 197). Edelman realizes that such a breakdown of categories “is likely to mean as well a breakdown of established hierarchies of values, and perhaps the stimulus for the emergence of new realities. It can bring intellectual chaos and search for new value hierarchies and new forms of order.... such a breakdown of categories and conventional perceptions of reality was precisely the purpose of the dada movement”

(Edelman, 1995, p10). These concepts are to a certain extent opposed by views through the CLM yet, are essential to views through the LSM and favorable within those on the basis of the EM.

Some of the various mechanisms of appropriation are pastiche or parody which are “the indispensable means of objectifying and thereby appropriating, the form of thought and expression by which they were formerly possessed” (Bourdieu, 1983, p.31). The creative work becomes dispossessed. Dispossession in the tangible world of property has a largely negative connotation, and for many this is, since the time of Locke, transferred from the tangible dust to the intangible bit: intangible (digital) property. Particular discourse might be excluding, or in its turn, dispossessing, the intangible property of its actual cultural value, and turning it into dehumanized data or information. Particular discourse and its consecutive actions might alienate culture from the public sphere into the private sphere, from public good to private property. Data or information are cultural expressions in an attempt to extract their social value, leaving these expressions into a stripped state, yet undeniably, when sufficiently efficient, still important within the market.

Present day forms of appropriation are labeled as anti-market, anti-capitalist, anti-property or disrespectful towards to income and property of others or at least as inferior forms of expression. Such utterances might stop certain people from using the techniques but certainly turn other artists towards them. For the latter kind of artist specifically, but also for its audience, the appropriation of cultural materials creates additional ways of looking and standing into one’s cultural and socio-economic environment. A reevaluation of values, of laws is requested, and implied within the resulting fruits and the surrounding heated debates.

2.5. Conclusions.

Habermas refers to conditions of freedom in relation to what can be understood as what he describes as free market concepts of competition and independent prices, which are to a greater or lesser extent homage to the *laissez-faire* principle. He goes on

as if struck by surprise that “no one was expected to be able to gain so much power as to attain a position that gave him [or her] complete control over someone else” (Habermas, 2000, p. 144). He realizes and shares that in contradiction to what was not supposed to happen because of imperfect market conditions “social power became concentrated in private hands.” (ibid.). Habermas discusses interference of the state, by the end of the nineteenth century, in the private sphere, and explains that the masses, which started to participate politically “succeeded in translating economic antagonism into political conflicts”(ibid., p. 146). Currently one can find that, rather than a blurry concept as the “masses”, diverse communities, such as artists and specifically those online, are in conflict with interferences not specifically of the state but rather of the market and the corporate private sphere into the online public sphere of cultural identity and the cultural environments, as, for instance, the intellectual, or the artistic, to name but two. An example is the sales of YouTube.com to Google™ and possible changes in user-made content as well as its related communities due to this transfer and understandable tightening of copyright control. Another example are court cases by corporations against artist-activists with the demand to remove their work from websites due to the use of their product in the artist’s work, such as a Barbie doll, owned by Mattel™, used in a photograph series named *Food Chain Barbie* by Tom Forsythe. The list of examples is quasi endless.

In line with what Habermas advocates, these are conflicts that, because of the effect of the effort, will save what one struggles for (ibid.). In fact one might be of the conviction that one would not struggle for what one doesn’t care about. In this case some might pose artistic appropriation, as one of the various mechanisms more or less accentuated depending on the models used to look at these same mechanisms. Appropriationist mechanisms possess the option of being such elements in the struggle that might actually be saving the system of copyright, the public domains, the creative commons as well as the actual appropriated works from becoming cultural zombifications, or semiotic impoverishments. Appropriationist mechanisms recontextualize, or reconstruct the public spheres, these mechanisms do not reduce the spheres. They create various kinds of artistic output (A) for which dominant discourse might yet fall short of providing the proper support, (B) for which law has not yet entirely provided the proper rights nor space, (C) of which participants are far from finished debating about and (D) which put issues on the public agenda that need the attention of people whom appropriate culture. The debates, of which artistic expressions could be considered a part of, might over time instigate the construction of altered domains by

potentially building on the existing ones, and by possibly creating new relations between the public and the private. The latter is only possible if up-to-date, publicly and easy-access culture is available in balanced combination with privately owned cultural property reasonably available to the same public. This reformulation of the spheres is only feasible through forms of labor: physical, intellectual, emotional or artistic. On a granular level the work of art, and its appropriation could have a valid place as a stepping-stone in this process.

A growing unbalance might be observed between corporately produced culture and that of individual artists, not to mention the influence of creations by user-amateurs⁴⁶ as for instance within YouTube. Corporate cultural output is virtually unlimited by means of high budgets. Such output is also supported by high levels of marketing know-how, easy access to source materials, work power, logistics, and media, which function as distribution networks. The copyright term, at least in the US, has been extended over time currently getting close to a century-long monopoly within which the owner (corporations, heirs or by then the deceased creator-proprietor) can deny certain usage by third party actors, and demand substantial sums of money.

Imagine one artist wishing to use a dozen snippets from various owners. The finances, logistics, and negotiating powers, if not delegated (which is as much a high cost) all need emotional, intellectual and physical investment, each costing amounts of energy which could be spent on the actual process of creation rather than struggling with law, business agreements and socio-economics. At least the struggle could be expressed within the artwork rather than simply within the *process* towards a legitimization of making an artwork. The energy to be spent is enough high one might refrain of even thinking to spend it on making an artistic, intellectual or simply participatory cultural comment or innovation, which for the most part is on and with culture that is *controlled* culture. It is possibly not Shakespeare whom is in dire need for additional discursive input but rather cultural output, hic et nunc.

It is more acceptable to see an attempt within the law to promote artists rights, moral rights, property control, specific (yet not all) incentives for innovation, yet to observe little attempt to equally provide liberty for users through user rights or civil rights, besides a hint towards fair use which is socio-economically under siege.

Semiotic democracy intertwined with artistic appropriation, is a form of labor engaged in by users of artifacts. It is a means to blow new life into these artifacts, a means to

⁴⁶ "Amateur" is used here as opposite to "professional", The amateur is someone who has little to no financial gain from the activity nor does it fulltime. In the context here it wishes not to imply anything about the aesthetic quality of the amateur's work.

participate by means of the labor provided when recontextualizing, remediating, and rearticulating a surrounding cultural ecosystem. To provide public spheres, that do not force such participation into the fringes of legality or beyond it, is to provide at least sufficient oases in the form of creative commons, public domains, a legal and institutional infrastructure sufficiently balanced for proprietors, authors, and appropriationist artists alike.

Artistic appropriation is a set of mechanisms if singularly, at least in a dominant sense, of laboring within an existing cultural environment. Maintaining a stance, in which it is considered as theft, is unearthed when looking through the CLM, yet this view is possibly unsustainable; dismissing any limitations on these mechanisms, as might be accentuated through the LSM is as well unsustainable. A balance, such as put in the limelight when looking at appropriation through the EM must be debated, found and implemented. So, whether or not an appropriationist work is theft or a form of cultural creativity and innovation is not inherently defined in the nature of an appropriationist mechanism but rather in the way one looks at it and implements it. This weakens a possible absolute approach as one could use when looking at appropriationist art as if one is looking at piracy. Although it should however not be forgotten that art has never been free of one or other form of appropriationist mechanism, it simultaneously should not exclude a critical attitude towards appropriation as well as commodification and the methods used in the protection or dispersion of both. In this chapter not only copyright mechanisms, or appropriationist mechanisms have been dealt with but also discursive mechanisms. All three are put to the test in Part Two of the thesis in which they are linked to one or more of the three case studies.

Part Two.
Case Studies.

Chapter Three.

The Simpsons in the Opera.

3.1. Introduction.

The motivation for the following three chapters is mainly twofold. Firstly, these chapters provide more substance to the theories and concepts developed and provided in Part One. Secondly, the cases, each provided in their respective chapter, are exemplars of how artists, and other actors, struggle by means, because of, and through copyright mechanisms, discursive mechanisms and appropriationist mechanisms. The cases fit within the framework of this thesis and its search for some light on the central question, being the ways different copyright mechanisms are intertwined with the artistic struggle within the public sphere.

Describing and interpreting tensions in each case empirically sheds a light on the exploration of the central question. In one specific case, in Chapter Three, these tensions are found surrounding a popular TV animation, *The Simpsons*. Secondly, in Chapter Four, a case is dealt with involving visible offline and online logos from Mozilla as well as Starbucks. Lastly, in Chapter Five, a case is explored based on Brian Eno and David Byrne's milestone for pop recordings and currently common artistic mechanisms: *My Life in the Bush of Ghosts*.

Within this thesis there has been deliberately chosen for three cases covering rather popular forms of culture because of appropriation is most strongly contested within the popular forms. An artistic mechanism is certainly not limited to an artistic copying of dominantly available artifacts, the popular ones are obviously available. Although all three cases are in some shape or form of importance to developments within new media, especially the last two could not have occurred without it.

Each creative work, within each case, is introduced shortly. Critique is given and associations are provided of the examples within each case to some theories taken into consideration within Part One. Such associations entail the discursive mechanisms as

described in the second chapter, and Boyle's principles as described within section 1.6 of Part One, Chapter One. Intertwined therewith, other issues raised in Part One, are reiterated and built upon. Such issues are for instance related to the local and the global. Obviously all cases are related to copyright and appropriation issues.

This first chapter indeed commences with an analysis and critique on a case involving the TV animation, *The Simpsons*. In this chapter, besides introducing *The Simpsons* and its related case concerning appropriation, there is also an analysis of the case by means of the discursive mechanisms discussed in Part One. The importance of the latter is the conviction that a struggle, in this case, one intertwined with copyright and appropriation, is concomitantly anchored in discourse. In fact the position in relation to copyright and appropriation one or other actor has, is interlocked, and decided through discursive mechanisms, as well as the discourse used or formed.

3.2. An Animation and its Appropriation.

This case finds its catalyst in an animated sitcom, about a dysfunctional family, known as *The Simpsons*. As a source this animation is sufficiently extensive: quantitatively in frequency and over time, and qualitatively in its content and context. It is cultural material that has been licensed by the Fox Broadcasting Company and aired since 1989 with weekly airings on several stations within several countries. It is cultural output on a global level. According to Pinsky quoted in Gray, the show is "watched by an estimated sixty million viewers weekly in seventy countries" (Pinsky, 2001, p. 2 in Gray, 2006, p. 6). Therein lies an irony and a tension, because it is, as a product, hyper-global versus as content it is, a narrative, or a fictitious and magnified depiction of that same world the product is distributed in - imploded as ultra local. *The Simpsons*, besides its market features, is a narrative set within the relatively limited realm of a small American town.

The infrastructural constituents of this fictional town-world are themselves solely appropriations of existing cultural elements. These animated elements are a virtual reconstruction of a blue collar family within the context of a presumably typical town. For

instance, it has its library, town's square, the mall, a school, shops, etc. It contains characters performing, for the most part, daily activities molded into a mix of persiflage, burlesquing and naive representation of what one does in the "tangible" world. These activities are performed on several social levels: family, friends, neighborhood, and school. In other words, this world *The Simpsons* characters occupy contains a copy of what one knows as the public, and the private spheres. It being an animation accentuates the daily priorities, worries, needs, obsessions and fears, every one of us can, to a certain degree, relate to or recognize in others.

This animation's content is intertwined in a feedback loop with a network outside of its virtual boundaries. The virtual, and the intangible, are convoluted with the real, and with the tangible. Be aware that they are intertwining into a rather blurring existence. Viewers are themselves appropriated, as caricatures, within *The Simpsons*. For instance, this is the case when viewers watch the characters and when they observe them watching an animated TV program named *The Itchy and Scratchy Show*: an animation in an animation. This too is ironic when knowing that *The Simpsons* itself was initially created to be part of another show: *The Tracey Ullman Show* (Gray, 2006, p. 6). *The Itchy and Scratchy Show* as a show-in-a-show, is a recycling or a nesting of such concepts as TV, viewers, animation, violence and *Tom and Jerry*. This is a mirror-into-mirror form of ironic indexing of the viewer-consumer-participant-appropriator. Viewer-participants are appropriating snippets of *The Simpsons*: one imitates its characters; one feeds them; one becomes the characters; one is the character in a quasi split tension of compliance and opposition.

The Simpsons is an appropriation of the tangible world into its intangible state, consecutively filtered, veiled and fed back into the tangible world through the actions of its recontextualizing producers, being the proprietors, the creators, as well as its audience whom not passively consume merchandise or other ancillaries such as T-shirts, mugs, dolls, books, board-games or, on a meta-level, imitation, fan fiction, copyright infringement court cases, news paper articles, fora, academic papers, etc. This process of recycling has been maintained since its first episode of December 1989. Each participant has an incentive within the various spheres of the private, and the public.

The creators of *The Simpsons* appropriate from various sources: copyrighted ones, but also those within the public domains. Although it might be tautological to mention that *The Simpsons* is a creative work, in a quasi-perpetual recyclic process, it is debatably authentic or even original. It is agreeable for it to be judged as original in its graphic design of its characters or backgrounds. The animation's storyline or narrative is as much unoriginal in its

source materials as the product might be defended as partly genius in its resulting collage of appropriated culture, its economic success, its duration of broadcasting, and how it was intertwined with and affecting (younger) citizens or citizens whom grew up with it during the nineties. The fact that it is not original, or rather not in its entirety "directly and personally by a particular artist", and that it is "dependent on other people's ideas", or that it takes the usual and turns it into a creative work is actually in line with the processes of appropriation and does not exclude it from being innovative at least through its arrangement of its appropriated elements (Hanks & Pearsall, 1998).

The Simpsons was (and still is), to keep it modestly, an actor, or a non-human participant in its own right, in pop culture of the nineties. It is an element of culture that speaks to the hearts and minds of its viewers. Actually "viewers" sounds rather too passive, and in the light of Fiske's *semiotic democracy*, "participants" is, here too, more appropriate (Fiske, 1987, pp. 236, 239).

As *The Simpsons* is foremost a consumer product, it adheres to the dynamics of the market and to the laws supporting such market - the copyright laws being one set. Although Lefton mentions little about the global profits the local US profits alone are staggering as "during the 1990-1991 TV season, Fox licensees were shipping more than a million Simpsons T-shirts a week and more than \$1 billion in licensed Simpsons merchandise was sold in the U.S. " (Lefton, 1992, pp. 16-17). Not to mention the broadcasting rights the UK's Channel 4 reportedly paid of 700,000 pounds per episode (Gray, 2006, p. 6). Although as the show has entered the twenty-first century some might argue that it has lost its impetus; moreover that in 2006 the show was not even close to being up there with *American Idol*, it nevertheless had a weekly 9.2 million people view it on Fox alone (Mahan, Colin, 2006).

3.3. Source Material for Appropriation.

This product, which its proprietors protect with the sole purpose to maximize its economic value, is unlimitedly quoting culture yet is simultaneously limiting the dynamic of being quoted. A classic example of this is one of the works by the filmmaker Jon Else, who ran into copyright clearance problems with *Sing Faster* - a documentary he had made

surrounding the stage hands' view of *Wagner's Ring Cycle*.⁴⁷ He was obligated to cut and replace four and a half seconds from *The Simpsons* captured by accident in one of his documentary's scenes. The people he was actually filming, whom were playing a traditional board game, were backstage while the opera was performed. A small TV in the background was showing *The Simpsons*. Matt Groening, the creator, but not exactly the (sole) owner of *The Simpsons*, didn't object, neither did Gracie Films, but Fox demanded \$10,000 for the rights to the 4½ seconds. Although Jon Else could have relied on fair use, he was afraid to have to endure the costs of potential litigation (Lessig, 2004, pp. 101-11).

These are costs that are drastically more endurable by a corporation, such as Fox, than by one individual teacher-documentary maker, as Else. To put the latter statement in a broader perspective it is useful to mention that Twentieth Century Fox is a subsidiary of News Corporation Limited, which also owns at least 28 newspapers, and such companies as TV Guide, Fox News Channel, The National Geographic Channel, Direct TV, The Australian, Sky, Fox Searchlight, The Sun, New York Post, Star, MySpace, The Times, Harper Collins Publisher, rottentomatoes.com, etc. Rupert Murdoch runs News Corporation Limited. News Corporation's 2003 financial Report states it clearly: "... contributing to our gains in Filmed Entertainment was our thriving television production business, where higher syndication profits from shows like *The Simpsons*, *King of the Hill* and *X-Files* as well as revenues from our pioneering efforts in television home entertainment combined to drive up earnings" (News Corporation, 2003, p.7).

After having to contact three parties on several occasions in relation to the four and a half seconds long accidental shot in a creation that had no essential relations to *The Simpsons*, though simply created the proper cultural atmosphere of that moment in time, he cut the scene. Even though he thought it important to it, the scene was not worth ten thousand dollars and surely not the expenses for litigation, concerning the fair use of the material, if he were to risk keeping the discussed material, without paying the aforementioned amount (Lessig, 2004, pp. 107-111). Else's artwork was censored by his own (understandable) fear and uncertainty instigated by a third party's volatile threats and demands.

Although it should not be denied that *The Simpsons* merchandise is being pirated, or being copied for economic gain, it does not imply, because of cultural copying, it has failed at being a highly successful cultural and economic phenomenon. Firstly, *The Simpsons* participates within the public and private sphere into the formation and dynamics of the

⁴⁷ Jon Else is professor at Berkeley, <http://journalism.berkeley.edu/faculty/else/> . Read more on the documentary in an interview with Jon Else at http://www.indiewire.com/people/int_Else_Jon_990609.html

identity of the culturalized individual as a centrally controlled culture appropriating product, *The Simpsons*, as stated before, appropriates a caricature version of the world one lives in. Secondly, although it is property it still is, as seen in the sheer numbers above, part of culture as a whole. It is a culture product. Lastly, it is also a product producing culture, being that people talk about it, imitate it, consume memorabilia, or collector items, dress in clothing with depictions of the characters, etc. It simultaneously refuses to participate in the individual's expression of that same identity outside of the private sphere. At least it refuses to do so in a manner that is financially, logistically and legally feasible for that same individual to share an expression within the market and public sphere. It does however sanction the expression of the individual conform its extra-legal standards of how, when, and where its predefined cultural props can or can't be used. This can be called extra-legal, as going four seconds and a half off track results in a disproportionate price tag that seems not within the spirit of the law, consequentially having vast socio-economic and cultural effects for citizen-participants whom are, budgetarily, not affiliated with any corporation, and thus should not be expected to function on similar budgetary levels. Under such conditions the artists might find the resources in abundance to comment and participate in society, though bending under the fear or pressure of potential legal action and financial bankruptcy, the cultural participant can only gaze but not touch. Certain culture might become little more than a peepshow.

The core system of copyright nor the system of financial compensation is in question, but rather the inappropriate financial amounts and confusion created in relation to an overreaching prominence of market dynamics limiting the artist to obtain the tools and resources to participate appropriately. The market is filled with various participants not simply remaining within it but flowing in and out, taking residuals from each sphere into the other spheres: of and to the public and the private.

Additionally it is ironic that the corporation takes full responsibility to define, uphold and collect the financial equivalent of its self-defined price tags, yet within a legal disclaimer in the beginning of its product, in this case *The Simpsons*, it explicitly distances itself and denies any responsibility on the content or points of view expressed within the same cultural product.

3.4. The Surrounding Discourse.

From a discourse analytical point of view and focusing on few of its mechanisms such as *commentary*, *discipline*, *rarefaction*, *ritualization* and *intertextuality* it can be observed that the example is not exempt from these mechanisms.

The Simpsons as a product, as content as well as an artifact follows the rules of the discursive mechanism of *commentary*. Here mainly focus is directed on *The Simpsons* as a cultural product creating a tension between the proprietor and the collector of cultural environments: a documentary filmmaker. The product is discussed within the market through marketing techniques such as the relentless merchandising and its profitable returns. It's a success story that writes itself simply by the numbers and the continuous interlocked supply and demand. The number of viewers has gone down since it first aired in 1989, initiating a decade of high numbers of fans and consumers. Still today the producers seem to find market saturation has not been reached, a conclusion deduced from the fact that the broadcasting and merchandising of the product has been continuing non-stop and globally.⁴⁸

This is inviting to link back to the befitting quote, in chapter one, from Foucault, which is reiterated here. These commodities and their proprietary status “give rise to a certain number of new speech acts which take them up, transform them or speak of them... [T]hose discourses which, over and above their formulation, are said indefinitely, remain said, and are to be said again” (Foucault, 1981, p.57). The quote can be used further by stating that when the fear factor is absent, *commentary* can be given more freely by those whom own that what they are commenting on, than by those whom do not own it. This can be clearly seen in the above example given by Lessig on Else and the latter's strong reluctance, even dismissal, of the Fair Use Clause of less than five seconds of *The Simpsons* within a context that is not in the least occupying the same niche of the audio-visual market. As such through their own budgetary freedom and cultural vault, corporations, such as News Corporation, can easily comment or innovate without worrying; all is taken care of by the finance and the legal departments to path the way for their culture producing departments. Additionally in the realm of *commentary* one could say that having to contact three parties to verify whether or not one can use five seconds, besides the other copyrighted material that needs verification, is part of this mechanism too: one individual needs the comments and approval from several

⁴⁸ According to the News Corporation Limited's 2003 Annual Report, the number of viewers went up compared to the declining years before it.

parties; parties which formed a chain of command; a chain of command which is adhered to and forms a quasi-impenetrable shield.

The provision of comments is interlinked with the mechanism of *discipline*. Those artists, as a subset of consumer-participants, whom do not subscribe to the corporate *discipline*, that is, to the accepted disciplinary structure befitting market validity, supported by budgets, negotiation, and litigation, are expelled from the game. The assertions which do not fit within the incentives or targets or which cannot answer to corporate whims are dismissed as inferior or are to be neglected. The neglected cultural forms are thus considered non-existent even by the actual artists such as Else who simply, without too much of a fight, cut a part out of the cultural environment of the workers behind the coulisse. If it cannot be litigated, it seems, from the above example, it should not exist.

The Fair Use Clause, if not a need from the proprietor, is incompatible with maximization, commodification and market share. To provide the four and a half seconds with a ten thousand dollar price tag in addition to the fuzzy copyright notion of fair use made it for Else virtually impossible to deliver a creative work befitting (A) his demarcations, of where a particular cultural environment begins, ends and what it should contain, and (B) of his methodology, making documents of what is occurring as recorded by the camera within that time-space without having to alter the nature of what is observed through its lens in post-productive editing.

Rarefaction is at play when observing the responds of the corporate proprietor, acting in terms of maximization of financial profit and thus having a difficulty thinking outside this discourse. Although, it is clear, from other participants, variations in discursive choices are possible. It's a reiteration when quoting Foucault and Mills as they claim that it turns out, in practice, that the utterances remain "repetitive and within certain socially agreed-upon boundaries" (Mills, 1997, p. 70). Technically the corporation could provide any utterance yet it simply follows those sanctioned within its own discourse. It is socially agreed upon that a corporation is not a charity and it thus behaves as such. Concomitant to its nature and its "desires and needs", the topic the corporation maintains is that of increased profit (Mills, 1997, p. 70). Else too follows a discourse fitting "certain socially agreed-upon boundaries" (ibid.). He was not granted access to the corporate discourse as packaged in the cultural proprietary format known as *The Simpsons* for he did not satisfy the requested conditions. Else followed that of the law-abiding citizen choosing for socio-economic safety rather than cultural authenticity. Looking at *rarefaction* as active in both parties, both parties carry responsibility, in variable degrees. Though, neither actor has to necessarily be, over time, the

dupe of this mechanism of *rarefaction*. Simply due to the dissemination of the above example, as it has been provided by Lessig, and those whom appropriated it by means of quotation, might alter the presumed dominating effect of this mechanism in future cases.

The rituals supported by Else and those by the Fox Corporation in relation to its cultural product of *The Simpsons*, are not compatible. If, after contacting the corporation, Else were to use the snippet without compensating the proprietors, he would have suffered the consequences of litigation (or at least as it was threatened). Even if he is in his rights, litigating does not belong to his daily ritual, but it does belong to that of a corporate legal department. The prospect of litigation is not sanctioned by Else, neither is the prospect of users freely appropriating content a sanctioned part of the corporate rituals. This creates a tension. From Else's point of view the corporate request might have been immoral or even perverse. From the corporate's point of view it might be seen as criminal if Else doesn't pay; not to ask him for a payment is scandalous, or even immoral.

Besides that *The Simpsons*, as content, "moves through other texts and genres" as it appropriates its cultural environment, it, as a product, is a catalyst to make apparent the *intertextual* support and opposition both parties, Else and Fox, have (Gray, 2006, p. 119). The individual filmmaker's documentary is not simply *intertextually* interlocked with the unclear definition and polemics surrounding what the Fair Use Clause practically entails and what it does not, but it is also intertwined with the enlightened humanist view of increasing the arts and knowledge for the better understanding of our fellow beings and the world they shortly roam within. This, by that same discourse, is seen as a positive human endeavor, and a text, which possibly has its roots in religion. Utterances as "building on the shoulders of giants" as well as "knowledge for the good of mankind" and their surrounding world-views are supportive of the filmmaker's work. Additionally the *intertextuality*, playing against the filmmaker, and obviously supportive of the corporate participants is that which surrounds the sanctimony of property within a free-market, monetarism, the romantic texts promoting originality, and authorship as authentic and personal, with a direct link fed back to text concerning personal property. Text opposing discourse for a society free of private property is also opposing the fair use of that same property. A bipolar view is another possible textual reference making it more difficult to see the nuances, such as the Fair Use Clause, moving in the shades of grey between property and license, versus stealing. All legal texts have additionally a flair of authority and institutional validity over them, which should help each actor equally, though which seems to be more in favor, at least seen within this case, of the corporate reaction and their resulting status.

3.5. Conclusions.

The tools, the filmmaker thought to have available, seemed insufficient for him to be able to participate in creating his archive of events as they unfolded in front of his cinematic eye. The price the corporation had requested got not collected. This resulted in a backlash: an event evolving backstage during an opera performance could not be liberated from its obscurity because of what was emitted on a little TV-screen within that same environment creating a loose-loose situation: the filmmaker lost the authenticity of the scene and the corporation does not earn the income it had requested, not even one that, to the filmmaker, could be considered a more reasonable financial cost to endure. The corporation provided cultural text, build on appropriation, which was unsuccessfully managed as property, stagnating innovation and income. The loose-loose situation goes further by enforcing possible negative attitudes towards corporately owned cultural property and a fear to artistically innovate when newcomers see their possible role models succumb to fear.

This case has provided the resources to observe the power struggle between two actors within the public sphere. Although each actor uses the same set of discursive mechanisms, a clash occurred due to not only the different views expressed through these same discursive mechanisms, but also due to opposing priorities and incentives decisive of the series of action they establish maintaining, from their own view, a most favorable situation. The accessibility to series of actions by the proprietor is more favorable to that by appropriationist artists. Though it should be seriously evaluated whether or not accessibility should depend, as in this case, mainly on socio-economic determinants. The copyright mechanisms, although probably available within the provisions of the Fair Use Clause, did not supply the certainty, security, freedom to use, nor freedom from protectionism for the appropriationist artist. The same copyright mechanisms provided certainty, security, freedom to exploit, and freedom from infringement through any degree of copying for the proprietor. The resulting innovation is therefore the consequence of unequal access to random public spheres: the proprietor could, by means of its products, access the space the filmmaker cannot film as it appeared to him. The filmmaker felt he could not rely on the copyright mechanisms in his struggle within that space-time, the proprietor on the other hand could.

Chapter Four.

Fragmented Logos.

4.1. Introduction.

The purpose of this chapter, following the purpose of this whole second section, is to provide an exemplary case that looks at participation through a struggle between appropriationist artists, proprietors and to a lesser extent actors here defined as authors or artists of a work that is appropriated. This is achieved by means of observing some results coming from the artistic process of ad busting, one of the many mechanisms within the whole set of appropriationist mechanisms.

Ad busting, simply put, is taking any commercially visible form, such as a logo, or an advertisement, and altering its message. The alteration can be motivated by critique, parody, wit, puns, vulgarity, finesse, highly aesthetic forms, inflammatory content, etc. For this, material is provided that unearths again a tension between the corporate and a citizen's point of view. The case study is dual: that of Starbucks Coffee,⁴⁹ a chain-store franchise of coffee serving outlets within metropolitan surroundings, and that of Mozilla,⁵⁰ a developer of Internet browsing and related software technology. At first glance these two might not seem to have anything in common. Although approached slightly different they both do provide the dynamics uniquely created between artists-participants in struggle with other actors, such as corporations.

The Starbucks Coffee part of the case, gives the opportunity to look at two ad bustings of its logo. This part serves to discuss (A) a tension between citizen and corporation (B) a tension between the local and the global (C) seeming variations and similarities in ad busting between the Starbucks Coffee Case and the Mozilla case. The existence of tension is explicitly clear when discussing the Starbucks part of the case and an implicit tension is unearthed when discussing the Mozilla case.

⁴⁹ The official site of Starbucks is <http://www.starbucks.com/>

⁵⁰ The official site of Mozilla is <http://www.mozilla.org/>

To arrive to the Starbucks Coffee part of this case focus is first directed towards Mozilla, providing access to an ad-bust. Due to the nature of the "busted" material, and the result of the Mozilla busting it is not such sensitive issue, nor has it been, up till now, material for a court-case, as the Starbucks busts have been. This case is the appropriation of Mozilla's logo. This analysis unfolds the relations between various communities, the variations of the logos' meaning and form, the variation of the communities involved, fragmentations of logos and surprising results.

4.2. *Your License or Your Life!*

The French Art Libre license underlines free access, especially within the Internet and digitized resources, when stating:

"Avec le développement du numérique, l'invention d'Internet et des logiciels libres, les modalités de création ont évolué: les productions de l'esprit s'offrent naturellement à la circulation, à l'échange et aux transformations. Elles se prêtent favorablement à la réalisation d'oeuvres communes que chacun peut augmenter pour l'avantage de tous" (Artlibre.org, 2007, p.1).

The creation of ones own resources, is not done in isolation, there are numbers of individuals whom engage in this, and whom share these creations with others for further appropriation.⁵¹ These sets of individuals form fuzzy communities with their own resources, in addition to other external cultural output. Some communities (such as those promoting sharing) overlap tremendously, others have larger differences to overcome (such as those promoting any usage, including commercial usage, versus those opposed to commercial exploitation). Within mass media one is not always consciously confronted or directed towards these communities or their resources. Though, through the newer media such as the Internet and its facilities for downloading and uploading, from and to various sites or by means of P2P, these various communities have been put more in the limelight. Still one would actually have to look for some of them as a treasure hunter looks for riches. Each community has slightly similar or slightly different agreements under the terms of its licenses. These were mentioned previously: there are indeed various Creative Commons licenses, various GNU licenses, the French Licence Art Libre, and so on. All of these,

⁵¹ More artworks can be observed at <http://oeuvres.artlibre.org/> , 3 (Last accessed May 2007).

roughly said, provide more liberties to the users than the classical copyright provisions, which predominantly provides liberties and rights to the authors and certainly towards the proprietors. The users, within these alternative copyright mechanisms are taking more of the front stage than what they are in the classical copyright mechanism. Simply think of the difference in degree of openness towards appropriationist mechanisms. Through such mechanisms communities believe they can enjoy more extensive access and tools for distribution, and alteration through appropriationist mechanisms such as mixing, cutting and pasting, quoting to any extent, and so on. Mind you, these do not justify plagiarism because attribution of the sources, such as the previous creators, is in most licenses essential. These communities form a larger group collected under the term of copyleft. Tensions and confusions do exist as these licenses command that appropriating works under one or other license must result in providing the same kind of license for the "new" work.

It doesn't take much consideration to realize if one license for instance prohibits commercial usage and another doesn't, though both licenses allow the sharing and appropriation of works, it seems impossible to put a part of one work from one license accepting commercial application with another part of another work under a license, which is hostile towards commercial applications. The new appropriationist work's license would simultaneously allow and prohibit using the work for commercial and non-commercial purposes. The latter in itself could make for an interesting art work on a socio-economic and critical level. Again, this is putting a limit on the artist's tools and processes to participate with. The attentive artist needs (A) to be functioning as a quasi legal expert, or (B) at least to be interested enough in legalities and licenses, (C) a budget to pay for a legal assistant to figure out these administrative issues (whilst sometimes not having the kind of money to support oneself as a full-time artist), (D) to bow to the pressure and shun away from using any appropriationist means, or (E) to rebel and simply express, with disputed source material, which she or he feels the need to express her- or himself with, and this without taking any license into account.

4.3. *The Dinosaur and The Coffee: A Painter's Canvas.*

Mozilla is a California-based non-profit corporation developing Internet oriented applications. The Mozilla foundation, established in 2003, owns the Mozilla Corporation, set up in 2005. It wishes to support a global community by means of creating open-source software such as Firefox, an Internet browser. They make their stance clear in what they refer to as the Mozilla Manifesto: "...people are needed to make the Internet open and participatory - people acting as individuals, working together in groups, and leading others" (Mozilla Manifesto, v0.9, 2007). Further they continue by stating, "the effectiveness of the Internet as a public resource depends upon interoperability (protocols, data formats, content), innovation and decentralized participation worldwide" (ibid.). Mozilla's products would probably not be seen as artworks and one could wonder if any artwork could exist in relation to such functional information managing tools that are only a few years young. Nevertheless, these arguments are not to be dismissed and indeed it is not as easy to find artistic expressions in relation to this software package, a forged relationship between product and art is not new. One example could be Pop Art, a genre appropriating various daily life products. Others are Dadaism leading to Surrealism with its *Objet Trouvé*, also known as Readymades or Found Art. One can find, however, one painter, André Lozano, going by the pseudonym of Loz, who seems engaged in expressing himself through the symbols related to the open source products such as the logo of Mozilla.⁵²

The Mozilla case might, to some, not be perceived as eye-opening on an aesthetic level but, on the other hand, it seems elegant in the fact that it gives the impression to integrate various self-sufficient communities of content providers. One is the Open Source community, under Open Source Licenses, such as Mozilla's, the other is the community to which a painter such as Loz belongs, whose work is within a tangible non-digital realm, and who appropriates source material from the intangible digital world onto a canvas, and shifts from his community back into the digital world through the submission of a copy of his work as a digital picture under the Licence Art Libre. Additionally, to the digital picture being under this license, it can be observed from this digitization that Loz uses the copyleft symbol, an encircled mirror image of a "C", on his painting. The usage, for legal purposes, of any

⁵² Those, whom do not know the Mozilla logo, can familiarize themselves through the artist's rendition at <http://provisoire.net/copyleft/peintures/mozilla.jpg>

authorship, publishing or property related symbol, excluding the artists name or pseudonym, especially the copyleft symbol is, to say the least, uncommon. One could wonder about the artist's intention in relation to the symbol having the intended licensing weight, and bringing the painting into the domain of copyleft, with its intriguing consequences that it can be appropriated by others, though in tension with its limits of having a physical form. It could also be that the copyleft symbol has been an aesthetic consideration by the artist in relation to the appropriated Mozilla logo. With Mozilla's products being free software and in combination with the copyleft symbol, this composition might be interpreted as an ode to the Open Source movement.

Indeed, Loz is a painter in addition to describing himself as: "Je suis net artiste, professeur à mi-temps et président de l'association 'provisoire' pour la promotion de l'art numérique" (Lozano, 2002-7). He has fused various disciplines, or at least his work touches on several. The artist follows the above quote from Mozilla's Manifesto almost to the letter when he appropriated the logo. He participates in an open way with a specific Internet community. He participates in a language he is comfortable with, not through designs by computer language, but rather through the design of an artwork on canvas. The medium of painting underlines his individuality simply by having made it on his own and signing it with only his name. The artist uses the Internet as a "public resource", "interoperates" and "participates" through content, in this case the Mozilla logo, creating or adding to a style of painting providing a representation, a portrait, not of a can of soup like Andy Warhol's 1964 painting, but of the present day Open Source community through the software logo and the copyleft symbol (Mozilla Manifesto, v0.9).

To some, the French license has an additional value as it is not attached to the dominant Anglo-Saxon or American legal culture but rather to a French one. This motivation, supported for instance by Mathieu Pasquini in what he sees as an avoidance of a "Hegemony of Google" and the negative sides of an American license within a French legal system. He explains:

"...96% d'œuvres sous licence Creative Commons, 4% pour l'ensemble des autres, cela frôle une hégémonie à la Google. Sans compter qu'il s'agit de licences créées aux Etats-Unis et transposées dans le droit français avec les difficultés que l'on sait. La Licence Art Libre est une licence française qui est la mieux adaptée au droit français. Et cela permet de rééquilibrer un peu le partage des licences au sein des œuvres... Voilà pourquoi j'ai choisi de passer ces 2473 œuvres et suivantes du Domaine Public sous Licence Art Libre. Pour des raisons d'équité et de philosophie" (Pasquini, 2007).

The interpretation of the Licence Art Libre in such way provides an additional tension, which seems to be following an awareness of pluralism versus the predominance of one. For instance, as Pasquini mentions, certain creative works have been migrated from the American Creative Commons License to this French license. The latter is of importance on a meta-level as an example that various communities have numerous motivations and are intertwined with one another in diverse ways. The actions of intertwined communities are actions of factual pluralism. These variations in license, or shifts from one to a next might result in, or be based on a need for variation or fragmentation of content, pluralism of ideas or worldviews.

The Mozilla part of this case seems elegant as it combines an element, in this instance a logo, of a globalized product, being Mozilla, through the appropriation of a rather local license, known as the French Licence Art Libre. Mozilla's global spread doesn't seem incompatible with the local approaches of an artist. Though, the impression at first glance might be elegant, when looking closer it becomes clear that in fact the software made by the Mozilla corporation is indeed free software but its logo does not fall under any license that gives users those kinds of freedom, like the Creative Common Licenses do, or like the Licence Art Libre does or like the license does under which its software is developed. In fact, the classical copyright laws and the trademark laws protect its logo. Resulting from this it could well be that, taken by the letter, the painter is actually infringing on the proprietor's rights to the logo in addition to shifting the logo from its actual legal licensing mechanism into another one being that of Licence Art Libre, possibly without the consent of the holders of the rights to the logo. At least nothing in the legal notices accompanying the artwork suggest otherwise. Mozilla's license illuminates:

"You may not remove or alter any trademark, logo, copyright or other proprietary notice in or on the Product. This license does not grant you any right to use the trademarks, service marks or logos of Mozilla or its licensors" (Mozilla, 2007).

This migration from one copyright licensing mechanism into another is indeed against the mechanisms themselves that clearly state that the licenses of the previous work must be kept identical in relation to the works appropriating it. Mozilla promotes in what it calls its "manifesto" - a word, which semantically has an obvious political ring to it - freedom, community and global innovational trends. This manifesto exists simultaneously with another of its web pages arguing for a closed and strict follow-up of its rights under copyright and trademark law for its logos. The motivation why it did not opt for licenses as the Creative

Commons, or the Licence Art Libre, is not clearly provided. The corporation chose not to apply these kinds of licenses here, possibly giving it, to some, a flair of using a double standard by, on the one hand, providing a “manifesto”, and on the other hand, terms that seem not compatible with the spirit of that same manifesto. It should be mentioned that parts of its website are available under the Creative Commons License.

From the information available surrounding the paintings as they are presented online, it seems that Mozilla hasn't pressed any charges against Loz, yet.

4.4. Glocal Logos: An Intertwined Struggle.

The meaning of the Starbucks coffee logo is decentralized⁵³ through its appropriation. This ad bust, named the *Starbucks Logo Fault*, is part of a whole series of activist events, and artist-activist creations (Starbucks Logo, n.d.). One rendition is in the form of a short Flash movie depicting the logo as if it were a malfunctioning neon light with specific letters flickering off and on, making the "STARBUCKS COFFEE" logo turn into a vulgar phrase by masking the letters “STAR”, “S” in the first word and “C”, in addition to “EE” in the second, while an “F” is created in the resulting verb by means of a derivative partial of the first word’s grapheme “B”. This was part of a larger communal action against what Starbucks' opponents claim to be the proliferation of the franchise supposedly altering their metropolitan environment negatively in addition to a reaction claiming that the corporation is providing or supporting insufficient labor conditions from the coffee-bean growers to the employees in the outlets (Coverco, 2000). Opponents to the corporation also state:

"The Starbucks Corporation, through aggressive business practices, has become a major contributor to the cultural homogenization of America and the world. This continued global homogenization of culture threatens to create a "monoculture" that replaces individual, indigenous restaurants and stores with international chains" (“Phluid,” 2004).

⁵³ “Decentralized” here is intended to imply an action with which the meaning of the logo is no longer within the hands of one producer. In fact through appropriation its meaning has not slightly shifted but drastically moved away from its initial centralized meaning. The meaning of the logo (and all its related elements of products, outlets, lifestyle, etc.) became diverse in character or content – a state of being heterogeneous.

Whether or not these allegations are based on facts is significant to be investigated outside of this thesis. Though, more importantly, as a focus here, are the artist-citizens, or artist-activists, whom believe they need to make a statement, a reaction against this corporation. Despite the fact their choice of language, the logo, and the resulting aesthetics might be questionable and of importance to analyze, this case is not one necessarily concerned with the overall aesthetics of a resulting expression but rather with the *availability* of mechanisms for artistic struggle. According to the activists, Starbucks has retaliated by having the activist-artist's initial webpage removed.

A parallel example within this case is that of Kieron Dwyer whose alterations of the Starbucks logo brought him into court. Kieron Dwyer's *Consumer Whore* version of the logo, was made in 1999. He made various products using his version of the logo: stickers, t-shirts, comic books and so forth. He was sued by the Starbucks corporation. The outcome of the court case allowed him only highly limited usage of his version of the logo. The sentence obligated him to refrain from making comic books, t-shirts, or stickers. He was no longer free to post his version on his own websites and as quoted "nor may he link from his website to any other sites that show the parody. In short, [he] is permitted to use the logo as long as Starbucks can be confident that no one will see it" (Dwyer, 1999).

The Starbucks globalized logo is in tension with other participant's locality. When Kieron Dwyer was ordered to handle his form of expression in very strict ways, this locality was diminished and the globalizing-processes re-increased. Kieron's interpretation of the Starbucks logo was an idiosyncrasy, which is a form of expression that cannot be more local.⁵⁴ Starbucks original logo used to be an idiosyncrasy when it was on the drawing board of its inventors. Though, after trademarking the logo, and franchising, and dispersing its related outlets all over the world it became highly visible and highly globalized.

⁵⁴ With "idiosyncrasy" two main denotations are implied: "peculiar to an individual" as well as "distinctive or peculiar feature or characteristic of a place or thing" (Hanks & Pearsall, 1998). More importantly the etymology of the word is what is implied here: the Greek "idiosunkrasia", from "idios" "own, private" and "sun" meaning "with" plus "krasis", meaning "mixture" (Hanks & Pearsall, 1998). The private (a peculiar meaning) is mixed into the (general) meaning (of what a logo in general is supposed to mean). Though, when Starbucks mixes its private meaning it does it so with the sole purpose to maximize exposure, thus to maximize profit. To do so the logo's meaning (style, form, implied lifestyle and product quality, etc.), has to be made hyper public and this beyond the local community. So too do adbusters take, in this case, the logo from the public sphere and filter it through their own private sphere after which they send it back into the public sphere. This public sphere is often the local community though through the Internet it is also a virtually global one. The adbuster and the corporation are in conflict.

For instance, in the year 2000, a Starbucks outlet opened inside the Chinese Forbidden City against which only in the beginning of 2007 Beijing's lawmakers began thinking, in a more open way, about the possibility of banning Starbucks from the particular place.⁵⁵

The logo, the outlets, and the multi-syllabic genres of coffee-based drinks have been globalized into a smooth lifestyle. The Starbucks logo, like any logo or brand, is an idiosyncrasy in hyper-drive; it is thus a locality that is globalized - glocalized⁵⁶. This distinctive or peculiar feature or characteristic, such as a brand's logo, is in a sense local because it forces us through law, to think of it as unique, and individual. It is therefore ultra-sensitive to any alterations outside its globalized rituals, it is the private seen by all - untouchable.

Additionally, the aura a Starbucks outlet wishes to emanate is one of the artistic, the hip, the cozy, and the intimate... Ironically, these values are identical within each of its outlets and thus possibly achieving the opposite, due to the fact that something ubiquitously available to anyone, with the proper income, cannot be unique, or intimate, or local. This is a tension within itself and in additional tension with forms of expressions, from third parties, from creative citizens, reacting to the previously mentioned tension. These latter, even though uncomfortable, do provide intimacy by means of their highly idiosyncratic state. The cultural responses by these activist-citizens to Starbucks' inner tension are non-sanctioned by Starbucks or those participants whom identify with the qualities Starbucks has to offer.

⁵⁵ For those not familiar with the Forbidden City (Gùgōng / 故宫; or Zǐjīnchéng / 紫禁城) Here one is provided with an oversimplified contextualization. The Forbidden City is the heart of the thousands year old China, right in the center of Beijing, next to the political nerve centre of the country. It was the palace of the emperors, not all of them but many. This giant complex was, with the guarantee of death penalty, forbidden for commoners, such as merchants, or other occupations. Mao Zedong, the Chinese communist icon, has liberated the Forbidden City from, what was understood then and there as, imperial powers. The Forbidden City is, on a cultural scale of importance, possibly comparable to the Pyramids, or Buckingham palace to the British, and Makka al-Mukarrama a.k.a Mecca (مكة المكرمة) to the Muslims, a site forbidden for non-Muslims. Many Chinese, young and old, have been known to express unhappiness about Starbucks in the Forbidden City, many are not even aware of it, some know of it though do not see any tension, more are afraid to speak up.

⁵⁶ "glocalised" is an obvious portmanteau, a combination of "two or more separable aspects or qualities of the two terms", in this case "globalized" and "localized" (Hanks & Pearsell, 1998). In his co-edited book *Global Modernities* the British sociologist Roland Robertson popularized the term "glocalised" (Robertson, Featherstone & Lash, 1995).

4.5. Conclusions.

It is true that some citizens feel compelled to oppose, comment, or revere those actors (human or not) that occupy a dominant part of their private, or public sphere. This is essential as up till now creations, such as Mozilla's, emerging from open source, do not occupy such dominant role (if ever) compared to the proprietor and highly commercial creative output, such as Starbucks Coffee. So, even if an infinite number of communities were to create an infinite amount of creative material it would still not provide access to those enclosed proprietary cultural monoliths. In Western democratic thinking it is, to a certain extent, expected and accepted to comment, parody one's leaders. Today, in our public spheres one knows of market leaders, though probably no longer of great generals leading a victorious battle.

Cabaret is a splendid example of social or political parody, where artists on stage can go very far in their form of expression. On the other hand, creativity is limited when it comes to consumer brands, or proprietary culture. Creativity, in various forms of appropriation, such as parody, pastiche, collage and so on should not be limited to the space between a ticket-paying audience and a coulisse. If it were limited to this narrow space it would limit the participants to those whom subscribe to that one language of a stand-up comedian (cabaretier). Not everyone engages in this discourse nor should be limited to it. Certain discourse is beyond the linguistics of spoken words or the comfort of a native language.

The appropriation of the Starbucks logo, is a case in which one can find the re-localization of that what is globally available by shifting the idiosyncratic value from the corporate to the citizen creating a hybrid between the globally standardized logo and the local individualized perception, and expression of that same logo. Artistically seen this is, if artists do not work in a group on one project, a dominant method to participate: individually, locally, and idiosyncratically. Appropriation is an extension of these dynamics, catalyzed by infrastructural dynamics of community, participation, communication, etc. As such are the symbols, and the discourse available at the level of communities, a tendency towards the global and once within the hands of the artist a tendency towards the local, which is thrown back, by the appropriationist artist, into the globalizing realm of that same or alternative community.

Dwyer's example, in this case, is one of a proprietor's opposition against decentralization of its property: the logo's meaning. Decentralization is here a metaphor for making something more available to the public, its opposite is the maintenance of the control of the proprietor's strictly regulating participation within its monopolized communication. A logo, for instance, becomes more available to the public by pulling it out of its protected standardized enclosure of form, meaning and protocol. One method of pulling is by busting it into an alternative form, meaning and protocol. The logo turns from a quasi-God's given command into public debate of doubt, reflection, concurrence, objection, shock and opposition. By limiting the exposure of the parody a defragmentation is intended; supported by the legalized exercise of the monopoly under the copyright and / or trademark laws. If a corporation retaliates in a draconic way against any shift in meaning unbefitting their own agenda or market prospects, globalisation of the centralized meaning of the logo reduces the idiosyncratic, local interpretation or articulations. The move away from fragmentation, for the proprietor, due to an angst over reduced non-maximized profits, market share and consumer trust, is essential. Though a valid question might be whether parodic or appropriationist versions of proprietary culture have the budgetary backing for marketing or the support of a solid foundation of know-how to compete with an already well-established logo and its supportive corporate structure. It is acceptable to state that, for instance, a parodic logo has no other product to offer to a potential clientele but itself in opposition to a corporate logo which has a whole brand, and a lifestyle to offer by means of its products and its established distribution networks tapped into by its consumer base.

Chapter Five.

A Cyber-Environment of Ethnic Ghosts.

5.1. Introduction.

In paragraph 2.4 it has been mentioned that music is an art form through which artists have used various appropriation mechanisms such as musical borrowing, copying and pasting, mixing and so on. They have done so for centuries and across borderlines. In this chapter a case of musical borrowing is explored that had its resources time travel and teleport from all corners of this world.

In this third and last case, firstly, in paragraph 5.2, an introduction of the participants (and their environment or community) is necessary to provide the context. These participants operate within musical forms. Secondly, the focus of this case is introduced: a participant's possibility for artistic appropriation. Thirdly, issues such as colonialism, as a way of looking at appropriation, are interwoven. Fourthly, in paragraph 5.5, this case is exploring a question concerning key terms, provided by Boyle, as described in Chapter One. Are Boyle's concepts of *balance*, *proportionality*, *developmental appropriateness*, *participation and transparency*, *openness to alternatives and additions*, *embracing the net as a solution rather than a problem*, and *neutrality* applicable to the issues at hand? Can these concepts be applied in the light of the central question concerning an artistic struggle intertwined with copyright mechanisms? These concepts are applied to the following case and provide a possibility for an analysis of the case as well as one to test the applicability of the concepts themselves.

5.2. *Once Upon a Time in a Never Ending Tale.*

It's some time before 1954, a Nigerian author, Amos Tutuola, writes a book, a novel, in fact, named *My Life in the Bush of Ghosts*. It's clear that no home computers are linked together into a worldwide web, no e-books are ready to be downloaded, and for that matter probably hardly any African authors embellish the bookshelves in a Western home. It is only until somewhere between 1979 and 1981, two musicians appropriate the book's title, as they believe it to make for a nice album name.

Indeed in 1979, amongst an array of musicians, two take the lead on this project: Brian Eno, who, at that time, is becoming a foremost producer and electronic musician, and David Byrne, who truly breaks through, in 1983, with the song *Burning Down the House* and as a member of Talking Heads. Brian Eno is known from his solo work as well as his work with such artists as Robert Fripp, David Bowie, U2, Paul Simon, and Talking Heads, to name but a few. Now David Byrne too is a veteran in pop music as well as the world music genre.

Although it is claimed that Brian Eno, one of the two musicians, was the one inspired by the literary work, to compose one of his experimental albums in fact other data oppose this and state that neither Brian Eno nor David Byrne, whom indeed worked on a recording by that name, had read the novel. They did however supposedly read Tutuola's first novel, *The Palm-Wine Drinkard*, published in 1952.⁵⁷

What, besides such trivial rumors, makes this recording so formidable? Granted, at the time when Tutuola was publishing his work, twentieth century contemporary composers as Pierre Henri Schaeffer, Karlheinz Stockhausen, and later Steve Reich were creating pieces by means of tape machines or tape loops, this work by Eno and Byrne, recorded in 1979, released in 1981 and re-released offline as well as partly online in 2006, is a milestone in the *popularization* of appropriationist mechanisms such as collage and sampling before the Internet and user-friendly digital technologies existed or at least were affordable (Smalley, 2000; Gross, 2000).⁵⁸ The 2006 reissue provides legalized opportunities for users to appropriate (parts of) two songs from the *My Life in the Bush of Ghosts* album into their own

⁵⁷ This conflicting data can be found within one and the same source, Wikipedia. Retrieved April 2007 from http://en.wikipedia.org/wiki/Amos_Tutuola and from http://en.wikipedia.org/wiki/My_Life_in_the_Bush_of_Ghosts_%28album%29

⁵⁸ It must be mentioned that the popular 1968 recording by The Beatles, *The White Album's* track *Revolution No. 9*, used such mechanisms too. Yet, Eno and Byrne apply the techniques more extensively in their work.

creative work. Additionally, one might wonder whether many still remember Tutuola's appropriated book title.

Though, it is the previous in combination with the following argument that makes this album of importance namely that its release was the beginning of establishing ethnic sounds and ethnic music more into the Western mainstream. Besides being a claimed milestone on methods of composition, and introduction of genres it was also the source for tensions concerning colonialism, religion and copyright.

5.3. Artistic, Ethnic and Religious Property.

Critique in 1981, of the work being colonialist, or cultural imperialist, was expressed because it submitted ethnic rhythms, ethnic vocals or other local treasures, disconnected from their ethnic origin, to western musical structures: "You'd think that if Algerian Muslims had wanted accompaniment while they chanted the Koran, they'd have invented some. Or if Lebanese singer Dunya Yusin craved a backbeat, she could have found one" (Pareles, 1981, p. 1). Indeed, appropriation in general, as well as of specific ethnic sources, could be seen as a form of colonialism, although here a negative connotation is implied concerning a historical context and tension between Europe and the rest of the world, especially Africa. This critique thus additionally implies a cultural stagnation or segregation. A claim on social property based on ethnic rights was at the basis of this polemic. What makes this tension of locality and globality worthwhile is that the colonization is a dynamic towards the global: one from a local idiosyncrasy into another one. The dynamic is clear here; in this case it has been from, for instance, an African cultural source, one local idiosyncrasy, into the typical personal cultural style of Brian Eno and David Byrne, another local idiosyncrasy. African musical style which, itself, has been assimilated and globalized through World-Beat music, Hip-hop, or appropriationist techniques, lost (some of) its idiosyncratic character, ever since – the colonizers have been colonized, *ad infinitum*.

It should be noted that present day North African as well as Sub-Saharan artists factually have been introducing Western elements into their work. Although particular aesthetic, artistic or other considerations might be predominant in a work, the appropriation

is, if ever, no longer simply unidirectional. The latter makes the earlier critique concerning unidirectional colonialism rather weak.

Certainly, a few African artists have been known to assimilate artifacts, which at first eyesight might be considered by some as “Western”. The styles and cultures previously wrongly presumed to have been entirely limited to a specific geographic area of the world have in fact been more or less intertwined throughout history. A simple example would be to listen to some Spanish and Turkish music in comparison to music from Xīnjiāng an autonomous region in the north-west of China.⁵⁹ Examples of African artists appropriating or bridging timbres, rhythms, styles or other are Youssou N’Dour, Ismaël Lô, Julien Jacob, Geoffrey Oryema, Richard Bona, and many of the artists whom have recorded their work under Peter Gabriël’s Real World Records. A Northern African style, which appropriated some elements, such as synthesizer timbres, not unfamiliar to more popular genres within globalized markets, is that of Raï.⁶⁰ Other works with variously intertwined cultural influences exist too. So is it as well in some of the work by Nusrat Fateh Ali Khan⁶¹ in cooperation with Michael Brook.⁶² Talvin Singh Matharu,⁶³ Panjabi MC⁶⁴, Tabla Beat Science⁶⁵ and Trilok Gurtu⁶⁶ are other such examples.

Back in the early years of the eighties, two religious institutions, one Christian and one Muslim reacted against some of the compositions using verbalized scriptures or sermons, according to these opposing parties, inappropriately, after which consecutive releases of the appropriationist work did no longer include the debated compositions.⁶⁷ This type of tension

⁵⁹ An example for comparison from the Xīnjiāng Uyghur Autonomous Region in the northwest of the P.R. China (Xīnjiāng Wéiwú'ěr Zìzhìqū / 新疆维吾尔自治区 / Uyghur: ئاپتونوم رۇيخۇتى شىنجاڭ) could be the Běijīng based group named The A Fun Ti Band, (阿凡提乐队) with their album *Qin Nuli* (琴努里). Their music is published by the China Minority Publishing House (中国民族出版社). Information can be retrieved from <http://board.verycd.com/t418434.html> and <http://lib.verycd.com/2007/01/17/0000136032.html> (Last accessed in April 2007). The aesthetic success rate aside, this band mixes Flamenco and Xinjiang sounds together.

⁶⁰ Arabic: راى

⁶¹ Urdu: نصرت فتح علی خان

⁶² Retrieved April 2007 from <http://www.michaelbrookmusic.com/>

⁶³ Retrieved April 2007 from <http://www.talvinsingh.com/>

⁶⁴ Retrieved April 2007 from <http://www.pmcrecords.com/index.php>

⁶⁵ a band including Talvin Singh and Bill Laswell. The latter also contributed to *My Life In The Bush Of Ghosts*. Retrieved April 2007 from <http://www.uprisemgt.com/artists/tbs/tbs.php>

⁶⁶ He has collaborated with Bill Laswell. Retrieved April 2007 from <http://www.trilokgurtu.net/>

⁶⁷ The consecutive altered releases came out shortly before the time Ayatollah Khomeini condemned Salman Rushdie’s Satanic Verses in 1989.

is, even today, in relation to other forms of expression, far from uncommon.⁶⁸ Here the appropriation of spiritual intangible property, which can be seen as part of a larger social property, was (and is) contested.

From the moment of recording to the moment of release supposedly about two years was needed to clear the copyright licenses for the analogue samples they had used. The intangible cultural property rights slowed down the process of making the work public, as well as excluded at least one composition for which the rights could not be secured (Georgievski, 2006; Kelman, 2006; O'Neil, 2006).

With the above three tensions surrounding variations of property, one could think of Arendt who wrote, approximately at the same time the music was about to be recorded, that the “Roman trinity” uniting “religion, authority, and tradition... [had] broken down...” (Arendt, 1978, in Benhabib, 1992, p.76). Though looking at the struggle related to artistic appropriation and the property that is being appropriated religion, authority and tradition have not entirely broken down. Actually, they seem, to certain actors, strong incentives to argue for cohesive property and against artistic appropriation. On the other hand looking at the series of actions engaged in by the appropriating artists one might argue that Arendt indeed had a point when the actors creating the work grabbed religiously connoted sonic bits from various places and without any authority, or tradition in one or other appropriated cultural snippet. They are interlinked with what individuals and communities experience as intangible forms of property: simply their copyright, or specifically their ethnic or religious property. These forms of property are imbued or laden with tradition, authorship and thus a form of authority. Due to such aura, they might be more attractive resources for appropriation, for claims on property, or for intercultural tension. Appropriationist art tries to glue this supposedly separated trinity together, in a shifted construction, on a meta-level, and is intertwined in various tensions in the process of appropriation. This is on a meta-level because religious or spiritual elements for instance are not glued back locally but rather are imbedded within a construction that needs its spiritual flavor, its ritual hint. It is thus a spirituality that is not defined by its local authority or institution but merely by its abstraction of having an exotic spiritual aura. As such seen from a different perspective it is understandable, for the same reasons as discussed within the first case in relation to

⁶⁸ An example is the highly controversial issue concerning the 30 September 2005 print of cartoons of the Prophet Muhammad in a Danish morning newspaper "The Jutland Post", (Morgenavisen Jyllands-Posten). Besides that any depiction of the Prophet are prohibited within the Islam belief, these graphics were considered, by a group of people, as additionally offensive in relation to how the Prophet and the religion could be interpreted by the readers.

discursive mechanisms, that institutions, with, for instance, their specific *rituals* and *disciplines*, supporting homogenization or cohesion, in favor of unity, or centralization, oppose these appropriating dynamics.

5.4. Appropriation and Online Participation.

The work by Eno and Byrne as well as the current appropriation of some of their work by current participants seem to be a search for synergies between Western artifacts, combining speech or exotic sonic elements with bits captured through mass media from public figures such as religious or political leaders. The 2006 re-release came hand-in-hand with two websites. One introduces the work as a whole,⁶⁹ the other provides access to an important part of this case: the possibility, under the terms and conditions of a non-commercial user license and in accordance to the Creative Commons License, to download all separate instrument's recordings, providing the user to remix, bust, bend or tinker with these audio tracks at her or his leisure with the possibility to upload and share them with others through the same site.⁷⁰ The site provides a forum to react and communicate with one another. Some derivative works have got a strong political content such as one of the participants with the alias MentalHealth uploaded a critique on George Bush within an appropriation of some of the audio tracks provided within the website for downloading in addition to samples from or about George W. Bush Junior. Others are simply of aesthetic value. The aesthetic value, and the resulting categorization of each participant's work, can, with keywords and dynamic graphic detail, be represented on the site. It is possible, by means of an infrastructural world map, to see and click locations where the appropriated works have been uploaded from.

⁶⁹ Retrieved April 2007 from <http://bushofghosts.wmg.com/home.php>

⁷⁰ Retrieved April 2007 from http://bush-of-ghosts.com/remix/bush_of_ghosts.htm

5.5. Seven Beats by Boyle.

The above-mentioned environment in which downloading, mixing, uploading and sharing are accepted practices is one which lends itself to be looked at through Boyle's key points. When he proposes the beginnings of a model to look at intellectual property he has a few ideas in mind that are important. They are *balance, proportionality, developmental appropriateness, participation and transparency, openness to alternatives and additions, embracing the net as a solution rather than a problem, and neutrality*. The concepts are applied to this case and provide us with an analysis of the case and a possibility to test the applicability of these general notions themselves in relation to the central question of this thesis.

The initiative, given shape through the website <http://bush-of-ghosts.com/>, is one which seems to be an attempt by the authors and proprietors to interlock with the present day artistic struggle in relation to copyright mechanisms. This is a struggle involving the pushing and pulling on concepts of open resources versus enclosed resources. The online 2006 project concerning *My Life in the Bush of Ghost*, seems an attempt to balance out these extremes. Boyle speaks of *balance* (Boyle, 2004, p.8). In this case, a *balance* can be observed between the property, in combination with the author's rights, and those that benefit a public sphere. *My Life in the Bush of Ghost* has its private sphere enclosed, concretely by that part of the work that is not open to legalized appropriation. Metaphorically, simultaneous with guarding off certain spaces as private, it invites visitors into two of its chambers. Two compositions, *A Secret Life* and *Help Me Somebody* are entirely available to the public to tinker with. The accessibility of these two songs implicitly refers to the enclosed state of the majority of the other songs. The two available songs, one could say, are partly reverse engineered by way of providing the separate instrument's audio tracks to each song. This is the common state of songs before they are mixed into a stereo track for consumer listening. It's appropriate to say that the songs are provided as if they are source code or open source.

A *balance* is indeed struck where the consumer can freely go beyond a less active assimilation into a more active participation. This initiative is in fact the opposite of DRM, Digital Rights Management schemes, implementing copy protection, as they exist for certain CD recordings, where the consumer has been prevented to copy the disc onto her or his

computer. In this latter system not only the individual songs are similar to closed software but rather the whole CD is. A CD, especially a copy protected one, is a hyper-closed system. The Internet, as apposed to the economic and technological limitations of the tangible and enclosed CD, is a platform offering partial openness to the inner workings of two songs. Creativity is thus in the latter distribution technology seen as such process in which participants primarily build on the results of others and secondarily build on the community resulting from it.

An important question is whether the initiative provides a benefit-cost ratio that is *proportional*. The licenses and agreements give sufficient freedom for participants to creatively express themselves within the limits of the two songs and within the limits of the non-commercial. It is not clear from the website whether the cost to maintain it and the non-maximized income due to the free provision of cultural property weighs up to the benefits. What might be the benefits for the authors? What are they for the corporations, or proprietors? And, what are they to the users?

For the authors one can see exposure, exploration and information as a benefit. Indeed, these benefits are identical for the proprietors, and the users. The authors obtain exposure through a stunt by providing, as high profile pop musicians, some of their work freely available. Obviously, this implies that those who want intentionally build onto it have to be open and willing to do so.

The available information on the website is beneficial to artist-users and provides a feedback system for evaluation and reflection by means of peer reviews of virtually anyone leaving a message on the forum, by uploading composition, or by sending in self-made music videos, which do not seem to have been put online yet. What better ways of interlocking with one's audience could one wish for?

The benefit of exploration is one on a level of what is called A&R, Artist and Repertoire. Within the realm of artists there are those who are talented and those who look for talent. They, who look for talent, look either for an artist, a repertoire or for both. Often, within the music industry the repertoire is more important than the author creating it. The repertoire is easier to manipulate, reassign and restructure than the author who is protective of its creations and identity. If such industry can build a system where it no longer has to look for artists but rather artists, or at least their repertoires, come to them, without the physical contact, it is highly beneficial. Searching for talent is like looking for a needle in a haystack. It is time consuming and needs budgets for logistics. The latter is an investment only with a

potential future return if somewhere some artist or repertoire is found that can cover the cost of the searching in general in addition to providing a profit.

The website is a highly controlled environment and fixed post of expenditure. It has a flair of being a global village yet it is simultaneously highly centralized. If appropriation is an artistic process than listening to various versions of the appropriation of the same source material is itself a highly valuable and stable resource for future creative exploration. These unique and well-defined resource materials are a demarcation on the infinite palette of the creative mind. In a sense this is like the Starbucks or Mozilla logos in the previous case. These logos are also a point of departure for further creative exploration. The reaction towards these departures is measured from that same demarcation point. The evaluation of the departure from the initial status quo of the logos is done in court, the evaluation of the departure from the audio tracks within Eno and Byrne's project is done within the website's forum as well as behind the site's front by the interested parties: the authors and the licensors but also its participating and peer-reviewing audience-artists. The court versus the website create different degrees of emotional barriers, such as fear, before participating: stage fright, fear of financial loss, fear of being stigmatized as criminal, etc. From the point of view of the licensors, or the corporations, it is within the current debate, surrounding the survival of the brick wall record labels, a fruitful experiment in relation to future business models. Additionally, it provides a friendly face to the record industry, which often is described negatively. The financial burden is controllable. The cost of the website, its bandwidth, or storage space can possibly be controlled and budgeted precisely. Taking these points into account it is thus fair to conclude that the benefit-cost ratio is most likely proportional.

The *developmental appropriateness* of Eno and Byrne's online project is synchronized with the development of its medium, the Internet. The Internet provides the channels to share open sources through which communities as well as content is created or innovated. This content can be software but it can also be artworks. The artworks under the Licence Art Libre, discussed in the second case, are such examples.

That what is *appropriate* is inevitably related to a standard, a convention, or to a norm. One could look at the norm, existent online, in relation to content in two ways. One way shows a norm based on a tension and thus fragmentation between two main forces. The first force is one which promotes DRM, copyright protection, implying enclosure of intangible property, cultural property, in other words: controlled content, information or data. The second force is one that promotes the opposite of the first. It promotes a decentralization of control, implying an openness of intangible content, information, data, or culture. Thus it

turns out that the views concerning the Internet's content is in a struggle and increasingly so when the content befitting one norm overlaps that befitting the other. Another way of looking at the norms is where a balance between the two is struck and an appropriate application of licenses and thus content is provided. This is an approach to combined licenses depending on the parts of the whole collection of content. For instance, as is the case with *My Life in the Bush of Ghost*, such collections or projects offers (A) the standard copyright license in relation to its 1981 and 2006 release of the music, (B) the Creative Commons License in relation to the online access to two open songs derivative works, and (C) its own user license with its terms and conditions of downloading, altering and further usage of these resources. James Boyle's view on *developmental appropriateness* and Klaus Günther's *principle of appropriateness* as discussed in Chapter One, are certainly applicable here (Boyle, 2004, pp. 8- 10; Günther, 1993 in Delanty, 1997, p.54). The participants developed an appropriate system out of the struggle as it has been unfolding online.

Directly as a consequence to an appropriate application of licensing techniques, of open versus closed property follows a possibility for participation, an availability of *transparency* as well as an *openness to alternatives and additions* (Boyle, 2004, pp. 8- 10).

Participation was already discussed throughout the previous sections. Concretely it could be argued that letting citizens, consumers, or artists not only participate on the level of legislation but basically letting them act on a grassroots hands-on level of free and legal creation with the property of others, will provide better insights to all parties involved concerning the legal constructions as they currently are at the centre of the artistic participatory struggle. As Boyle implies it, participation is possible when one has access to means, tools, processes or spheres to participate with and in (Boyle, 2004, p.9). In Eno and Byrne's project they have opened the possibility, on a meta-level, to go into debate not only on the aesthetic of appropriation but also on its political, spiritual and legal complexities. The debate provides a potential to *transparency* of the same issues being debated. A community is developed around the two songs. The participants experience interaction and the development of a composition based on the source material coming from giants. This creates a *transparency* into the workings by Eno and Byrne of creating compositions, and specifically those of a quarter of a century ago.

Innovation is obvious, simply by looking at the number of submissions by participants from all over the world. At the time of writing there were at least 270 submissions, all of which seem to have been uploaded in 2006. The authors, proprietors and audience-artists have shown openness towards alternative methods, tools and processes for artistic

participation. The website encourages and organizes means for innovation. The economic incentives for this openness have been discussed previously when looking at the factor of *proportionality*. The associations with famous musicians, as well as the potential exposure and peer-review for the participants, have been additional incentives for creativity. Not directly a monetary goal was the motivator. The Internet and the website have been indispensable in achieving this level of output.

Through the initiative the Internet, as well as the way of providing means for artistic appropriation, can be seen as solutions rather than threats of illicit copying (Boyle, 2004, p. 10). The openness shows that appropriation is a constructive form of copying, in no way related to the action of piracy. The 270 compositions are based on the same source material. Though, having listened to a dozen or so, it could be concluded that they sound sufficiently different. Thus, at least sonically, these cannot be classified under an indiscriminate umbrella of simple copies. Distinguishing between criminal acts and innovative acts, by providing the public space for it, creates an ecosystem of artistic creations rhizomically growing on the same soil.

My Life in the Bush of Ghost possibly provides a level of *neutrality* towards copyright mechanisms, similar to that found in the Mozilla part of the previously described case (Boyle, 2004, p. 10). As Boyle puts it, here too can one find what he advocates as the encouragement of innovation through both closed source, or proprietary projects and open source, or collaborative projects (ibid.).

5.6. Conclusions.

The terms and conditions make it clear what the licensors, whom are the proprietors of and beneficially own all the copyright, agree upon to provide the licensee with. Here the licensors are not (simply) the authors, Brian Eno and David Byrne, but rather are two corporations, namely Virgin Records Limited and the Warner Music Group. In contradiction with the tensions seen within the previous two cases, here a case can be seen where a harmony is intended by the co-existence of each party of actors, their interests and their incentives. Through the various licenses and provision of copyrighted property (through the sales of the artistic product) and the open source of audio tracks, a creative balance of a

consumers-artists-participants community is realized. Still the authors, and the proprietors can maintain income from the copyrighted material as is provided on the physical CD. The impression is that the tension between author, proprietor, such as a corporation, and user, such as an appropriationist artist, is resolved by means of innovative initiatives, such as the combination of website and CD of *My Life in the Bush of Ghost*. Harmony, and community is established, market is maintained and participation is stimulated through the downloading, artistic labor, uploading and feedback through the forum.

It is a pity to have to mention that behind this façade, the complete album is still pirated and distributed illegally over the torrent P2P networks. Appropriationist art does neither stop nor necessarily stimulate piracy, or vice versa. It does however stimulate participation and community. To equalize appropriationist art with piracy is to destroy such innovative and innovating community as if one were to plow the land in anticipation of harvesting monoculture and without taking anything of the land's intertwined ecosystem into consideration.

The set-up of the website as a creative public sphere as well as a billboard for marketing purposes is a win-win situation: the authors have the opportunity to express their ideas in novel ways as they share a part of their artistic history and their present views and interdisciplinary endeavors with the website's visitors, the appropriationist user-artist. The corporations show a willingness to relinquish a bit of control over some of Eno's and Byrne's music compositions whilst not renouncing their main purpose of making financial profit, the consumer becomes a participant, in the form of artistic expression. Communal action is created by the provision of an extra service in which participants can peer review one another.

Conclusions.

The central question to this thesis concerns itself with how different copyright mechanisms influence the artist's struggle during their participation within the public sphere. Essential are thus four elements: copyright mechanisms, artist's struggle, participation and public sphere.

The process of participation within the public sphere become more meaningful if those whom are touched by the developments within the public spheres, must have and find ways to partake in analysis and critique. These developments can be in relation to, for instance, artistic expression, property, civil liberties and the law. Throughout the case studies it becomes clear that the artist, for instance, can participate by means of their own methods, tempos or degrees of complexity. The artist, of interest to this thesis, does so by means of artistic mechanisms, of which, as previously seen, the set of appropriationist mechanisms converges or conflicts with certain copyright mechanisms in complex ways. The amount of convergence or conflict depends, as could be seen from the case studies, on how all the used mechanisms are implemented within a given situation. Boyle speaks of the importance for any participant to pay more attention to what rules are being developed in relation to intellectual property especially within the digital realm.

“We were writing the ground rules of the information age, rules that had dramatic effects on speech, innovation, science and culture, and no one - except the affected industries - was paying attention. As intellectual property is reaching out to touch everyone who is a participant in digital culture creation, citizens are asking for more of a say. If the debate is not yet balanced or fair, it is at least now a debate, not a one-sided lecture from the content industry,... we needed... a politics of the information age... Successful political movement [needs] both a set of (popularisable) analytical tools and coalition built around the more general interests those tools revealed.” (Boyle, 2006, p.1).

The quote is emphatic. The idea is supportable that a media sensitive community, pays more attention to the developments surrounding intellectual property, and its subcategory of copyright, and tries to contextualize it politically. The latter, although oversimplified, might make one wonder how one could do this. In this thesis a more particular community has been observed: that of the appropriationist artists. Robyn Eckersley, following Habermas, argues that there is something wrong when “processes whereby social... problems are increasingly posed as technical problems requiring technical

solutions by experts rather [than] as political problems that need to be addressed, first and foremost, by an informed and rational citizenry” (Eckersley, 1995, p.107). So too, does Garrett Hardin in his article, “The Tragedy of the Commons”, state that a technical solution is not the answer but rather a “change in human values or ideas of morality” (Hardin, 1968, p.1). Besides the economic, religious or other approaches, is the political an approach involving itself with interests, values and morality; being another motivator to reconstruct specific models.

The artists, as a group of citizens, potentially asking “for more of a say”, have been a valid choice (Boyle, 2006, p.1). Indeed the dominant position is not taken by artists but is rather occupied by the industry, or the proprietors. Though, looking at the various copyright mechanisms, as provided online, we can see a shift towards other kinds of participant such as the users or the appropriationist artist. This is seen in such mechanisms as the Creative Commons License, the Licence Art Libre, the GNU License etc.

The growing debate, which is an integral part of the struggle, depends on concomitant discursive mechanisms that can be applied in varying ways depending on the model one uses to look at creative works, appropriation and one or other copyright mechanism that is or should be used. It became clear that the participation through appropriation is clouded by, for instance, the discourse surrounding piracy and copying as a form of theft. The discourse mechanisms are used rather differently depending on the kind of model one uses to look at creative works and on how one uses these creative works while participating in the public sphere. Various discursive mechanisms are in place limiting the space for participation by the artist through particular means of appropriation. The more established their artistic series of actions become, the more discursive space will be carved out. The situation now is that the proprietor and author are taking the center stage. The appropriationist artist-user is gaining a place on that stage but still has to struggle with laws that understandably have been mainly developed with the latter two in mind. Though now with the digital public spheres available through Internet the user is demanding more space: discursive, creative and legal.

Boyle sounds hopeful, and if what he claims has any substance we should indeed do anything in our power to maintain attention to what is going on within the debates surrounding copyright, or IPR for that matter. The infrastructure normally available to, for instance, the corporate proprietors, discussed in Part Two, is not entirely or not yet available to an independent appropriationist artist. This partly defines the struggle for the artist. It is clearly observable between Fox and Else in *The Simpsons* case described in Chapter Three.

Not only the artist is influenced but it is only fair to mention that the proprietor is too.

The corporate proprietor, in turn, decides it cannot afford grassroots flexibility and flux of an independent actor, in angst its consumer base might not be prepared enough to accept it. Such grassroots actions are clear from the Starbucks & Mozilla case in Chapter Five. The proprietor, at least has sufficient economic incentives not to engage into, for instance, avant-gardist experiments. The appropriationist artist such as the adbuster, has such little incentives based on a consumer responds but rather potentially obtains those based on an angst of excessive legal repercussions. The adbuster has the power of guerilla-style approaches: a level of flexibility and maneuverability. The proprietor has the power of quantities in logistics, networks, manpower, and budget. The author, in the case of corporate logos, works for hire and has little control, if any, over the logo. So too, is it very likely the case (maybe to a lesser extent) with the creators working on *The Simpsons*, or with Eno and Byrne who most probably signed contracts with the corporate participants, whom probably own the recordings to Eno and Byrne's compositions. Although the latter is a standard practice in the industry, to get certainty the individual contract between author and corporation would have to be analyzed.

Of course any party, such as the artist or the proprietor, can co-opt the other's advantage to a certain extent but never entirely as that would not simply mean co-option but rather metamorphosis: the appropriationist artist, such as the adbuster, would become (an integral part of) the corporation; or the corporation would disintegrate into a grassroots appropriationist artist.⁷¹ One thrives more on decentralization and fragmentation, the other, the proprietor, predominantly thrives on centralization and cohesion. It is indeed different with authors whom work for corporate proprietors. They, if at all, share the cultural property with the corporate proprietor and most likely follow the guidelines as stipulated by the corporation.

Through their participation and struggle, both, the artists, as well as the proprietor, provide the public sphere with socio-economic values, and advantages on the level of innovation. Appropriationist artists are consumers whom innovate on a socio-critical, interactive and participatory plain by means of parts of the cultural fauna or flora, used as tools within their artistic mechanisms. Any resource appropriated is looped back into the artist's community or is shifted from or into another community. The proprietor possibly has capital, teams and networks available to increase innovation and the dispersion of the results

⁷¹ Certain corporations, such as MTV actually do assimilate mechanisms, and workforces from the grassroots level. So too do individual artists assimilate mechanisms from corporate levels, such as Ani DiFranco and her Righteous Babe Records label. She maintains control over most elements from source material do distribution of her finished product.

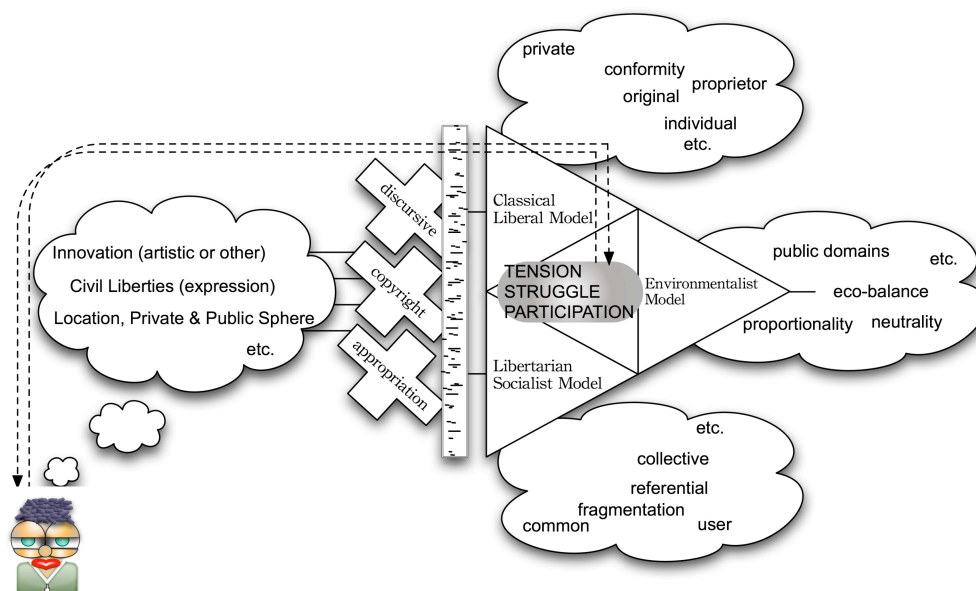
from that innovation. The issue is not whether one actor is or isn't innovative but rather if actors can or can't participate within their own cultural ecosystems by means of their favorite mechanisms and their targeted forms of innovation. Such innovations are not only artistic works, but also various ways to look at user licenses creating alternatives in copyright mechanisms, various mechanisms to create the artworks intertwined with the digital technologies and networks and various ways to cooperate and form communities. Intertwined are a quasi-insatiable tension, struggles opposition and support expressed through discursive mechanisms. These restrictions on mechanisms of choice due to a highly limited discursive space can easily be seen in Kieron Dwyer's *Consumer Whore* of the case described in Chapter Four.

One could wonder who truly benefits when draconic interpretation and execution of law are intertwined with a dominant proprietary cultural environment. The Fair Use Clause is such an example in which the repercussions of crossing over from copying supported by fair use into a copyright infringement is going from a tolerance directly into a zero tolerance, or differently put: from no fine to huge fines. One can look at *The Simpsons* case for examples on this. Indeed, stimulated by fear of repercussions, such laws might make for a strong property and increased innovation singularly through the enclosure of cultural space. Though, these possibly make for weak participation in relation to or by means of that same cultural space not open for artistic appropriation and consequentially innovation. The latter is the case as due to the limitation on the mechanisms and flexibilities for the users. The editorial removal of the few seconds in the documentary mentioned in *The Simpsons* case is a strong example of this. Certain cases might be discouraging and might show how copyright, or at least the interpretation, by user-artists, of copyright is not influencing them positively in their artistic participation within the public sphere. The documentary maker, Else, alluded at here, had the intention to provide an insight to the public of a very unique event though found little to no solutions within the copyright mechanisms available to him at that time. Though, beyond this case, this initial weakness is circumvented as can be seen in the fact that appropriationist artists keep on using the mechanisms, academia in legal departments suggest alternatives, and relatively young institutional and even corporate initiatives show shifts away from draconic interpretations, such as is the case with some of the copyright mechanisms set under the term of copyleft.

In Part One, three models were explored. These models are like various “filters” to look at the struggle, here specifically the artistic one, intertwined with copyright

mechanisms. These mechanisms are roughly the copyright as found in the articles of the law, and copyleft. The latter itself separates in various mechanisms. On the one side those mainly for the development of software and on the other side those providing opportunities for artistic exploration based on appropriation. In fact there are, besides the copyright mechanisms, two more sets of mechanisms of interest in this thesis: appropriationist mechanisms and discursive mechanisms. Each has been provided its proper place within the thesis and each is concomitantly interwoven with the others. The appropriationist mechanisms are numerous: copy and paste, collage, mixing, tinkering, bricolage, irony, parody, pastiche, etc. The discursive mechanisms, important here, concomitantly intertwined in the struggle amongst all actors involved and discussed previously are *commentary*, *discipline*, *rarefaction*, *ritualization* and *intertextuality*.

A schematic of the three sets of mechanisms and the models provides visual clarification. Whether or not one is observing the struggle through one or other model, within the confines of this thesis the mechanisms are always present. Copyright, discursive and appropriationist mechanisms are, within the struggle focused on here, coexistent. These three sets of mechanisms do not exclude one another. On the other hand mechanisms within one set might exclude mechanisms within that same set as seen in works which, according to their license, can be commercial versus those who can not be. The latter excludes the former and vice versa. Depending on the model one uses to look at the creative works and how those can be used to artistically participate with and through, do exclude or include certain mechanisms depending on how these are or should be implemented. This has been fully explored in Chapter One.



The practical implementation and the evaluation of these same mechanisms are varying depending on which model one chooses, filtering the way to look at the struggle.

For instance, Chapter Three, was dealing with *The Simpsons* case. This case actually implies two angles on appropriation. One is of a creative work and how it incorporates appropriation and the second is how the creative work itself becomes a potential source for appropriation. *The Simpsons* is almost completely created on the appropriation of existing culture. Simultaneously, Fox, the proprietor, is hypersensitive towards *The Simpsons* itself becoming a source for appropriation. This means that the proprietor does not allow it to freely, or for a less exuberant price, be appropriated. A tension exists when looking at this case through the Classical Liberal Model (CLM). Appropriation is shunned whilst simultaneously thrived upon. Looking at this case through the CLM, this tension is somewhat understandable. Property needs to be protected and innovation as well as assurance of individual freedom, (in this case improbably owned by the authors, but most certainly by the corporation) needs to be secured through private property. Individual freedom is guaranteed if private property is guaranteed. Turning to the Libertarian Socialist Model (LSM), makes one look at the innovation developed through a network of participants, a collective. For this to be possible, by means of private property, it becomes difficult to fit highly controlled property within the picture. Capturing of a few seconds, within a context and with a purpose that are obviously different from that what is captured, is, certainly seen through the LSM and the Environmentalist Model (EM), justifiable fair use. Supposedly, as seen in Chapter Three, according to the law it could have been dealt with as fair use, yet the proprietors seemed to have thought differently. In this case the end-user, the appropriating artist was in a clearly weaker position.

At the same time, the proprietors have over the years seen that appropriation, on their own terms, is good for cash flow. Any appropriation that does not stimulate this flow is not relevant, and must be shunned, if it is not itself a spicy source of income. It is, observable through the CLM, and following the discursive mechanism of *discipline*, not true that cultural participation, by means of appropriation, can simply and undeniably rely on the Fair Use Clause, without the proprietor trying to turn the appropriation down, by means of intimidation, if not turned into a lucrative deal for that same proprietor. As an example of this tension again *The Simpsons* case can be brought up.

It's obvious that *The Simpsons* is, as a *copyrighted* cultural phenomenon and with the legal support of the Copyright Extension Act⁷², monopolized for several decades to come. Although, content wise it depicts a dysfunctionality, within a fictitious blue collar family, on a market and product level its owners demand legality, and marketing conformity which in themselves are creating dysfunctionalities on an organic socio-creative and participatory level resulting in a loose-loose situation as described in Chapter Three. The dysfunctionality lies in the fact that the product itself is primarily based on appropriation yet that appropriation of the same product is made extremely difficult due to for instance the processes an appropriationist artist has to go through to get a license, and for instance due to the high price tag attached to that same license. The level of participation by the artist is organic as appropriation is and has been part of established artistic series of actions. These actions can be socio-creative as they are actions by actors whom comment, critique, alter or innovate with the public or for the public in a creative way. The proprietors enforce strict obedience to copyright law, increase of market shares, quality control of merchandise resulting in standardization and centralized control into strategically well-positioned franchises.

Coming from the proprietor, one can observe a responsibility towards maximized market share in the form of the privatization of the public sphere, with, besides that, a tendency towards a minimization of responsibility concerning other issues related to the private, and the public sphere. This means that the proprietors occupy more within the public sphere through proprietary cultural goods. The minimization refers to, for instance, disclaiming any responsibility and affiliation with the content of their own products, as can be seen in disclaimers of some films, or TV programs. The claim and responsibility taken, by proprietors, on creative work, and thus on culture is strong, yet not on its content, except when third parties wish to appropriate it, then ownership of the content is fiercely claimed; this is, to say the least, an odd arrangement. The appropriation within the hands of the proprietor, is not so much a creative act of an *individual* or of a public participation with democratic incentives but rather is foremost a marketing tool, a production tool with the sole purpose of profit maximization by means of product placement, endorsements, spin-offs, or bartering media content for free advertising airtime. Throughout this a contradiction is intertwined, as mentioned within Chapter Two, being a proprietor's wish to appropriate versus a wish to shun away from it. The privatization of the public sphere results directly in a diminishing of the public sphere. If it is within the public sphere an artist participates this,

⁷² This piece of legislation is being referred to several times throughout various texts and throughout this thesis and can be retrieved from <http://www.loc.gov/copyright/legislation/s505.pdf> (Last accessed June 2007)

taking into account the already limited discursive space, implies an intensified struggle in which copyright mechanisms can only do so much to support the artist but do a lot to maintain the privatized control. Therefore the copyright mechanisms grouped under the term copyleft might provide a positive influence to certain appropriationist artists.

Indeed, culture is put on the backburner and the market dynamics fundamentally shift not only the present cultural history, but also that of the future, as well as the past. This is clarified in the fact that if, for instance, in the future someone were to see the documentary discussed in Chapter Four, they would see an environment different from what actually took place and of what could actually have been recorded if it were not for decisive editing powers by monetary transfer, or rather the lack thereof. As such, within this case described in Chapter Four, which is not an isolated one, the copyright mechanisms, as well as the discursive mechanisms used by one set of actors versus those by other actors, influence the artistic struggle during participation within the public sphere. In this particular case intended participation failed. The document, the artist planned to share, was altered on the basis of a whimsical parameter in overdrive because fees for using cultural property are, for understandable reasons within a free market, not fixed by law. In all fairness it should be mentioned that the proprietors intention, to increase market value and revenue from one of its pieces of property, similarly failed. Yet, comparing the two, it has already been sufficiently shown, within the case itself, that this loss of income is nothing compared to the revenue, which has already been, and still is collected. As such it is not too far fetched to conclude that the loss of the documentary maker's one time project, is relatively larger than that of the proprietor. Participating by means of creating a work, through cross-fertilization, which includes a piece of another work, creates a tension between the works, their separate cultural ecosystems, and the actors involved, potentially altering the work itself. In *The Simpsons* case, *The Simpsons* itself, as a creative work, was not altered, yet the documentary was.

When participating, that what one participates in, and with, can be altered in various ways. In fact, they whom observe and participate are altered as well. For instance, in Chapter Five, the *My Life in the Bush of Ghost* case, actors can participate by downloading their source material and uploading their creative result. The latter is itself then digested through an online forum by other participants and their potential for observation of the creative outcome and the peer reviews thereof. This is a case resulting in seemingly positive alterations through a highly fertile system of cross-fertilization with pollen or seeds that can be recycled ad infinitum. In fact, the alterations go beyond an artistic work: a community, even so shortly, is brought into being. The individuals have temporarily shifted their social

networks catalyzed by artistic works provided by third party authors and proprietors. Here the alteration of copyright mechanisms has assisted the appropriating artists in (A) the creation of a large number of works and (B) the creation of a community whose traces can be revisited as long as their ecosystem stays online. The Internet has here the beginnings of a series of cultural ecosystems. These ecosystems are sensitive to the application of various forces and discourses such as when enclosures are intended through increasing privatization as well as artistic appropriation. As seen previously, one is more long-term, or eternal, and the other more short term or ephemeral. Examples have been shown in the case studies. The case described in Chapter Five, when seen through the EM, shows a glimpse of what dynamic artistic participatory communities could look like within cyberspace.

Nevertheless it is probably so that *every* consumer restructures the meaning of data, there is an undeniable difference when one looks at the level of participation within the *My Life in the Bush of Ghost* case compared to for instance watching one's favorite TV show. Although, Fiske might have intended to refer to any TV-broadcast's viewer redefining meaning, I am convinced this is a more proper example of his *semiotic democracy* (Fiske, 1987, pp. 236, 239; Fisher, 2001). The democratic element within this case is possibly not one on a large and highly consequential scale, though this would need further investigation. Yet, the participants on the site work with, around and in existing and new legal as well as socio-economic, and creative communal circumstances. It is a peaceful participatory redefining of structures on a multitude of levels: through, as described, various copyright mechanisms, through redefined financial posts of income, and through a rethinking of artistic-consumer interaction. The *My Life in the Bush of Ghost* website is a public domain, a small one, as if it were a creative corner one ends up in, after wondering the few quasi-uncharted alleys left in a metropolis on a sunny afternoon. It's surrounding architecture sets a comforting tone yet is there to gaze at, often not to be entered, and certainly, beyond the creative corner, not to be re-sculpted with spray cans nor chisels.⁷³ The site, with at its centre the audio tracks, is a resource for creative mining, sculpting and sharing.

Artists need data mines. Data mines, in this sense, are the sources for creativity. On the basis of the CLM, mainly creations that boiled up from a creative mind are validated, some basic quotation, strictly controlled Fair Use or properly licensed copyrighted resources are justifiable. Analyzing creations or forms of expression by means of the LSM, various

⁷³ Various cities provide some areas where, for instance, graffiti artists can freely express themselves on the surrounding walls, by means of a form of expression that elsewhere is illegal. For instance, in Antwerpen (Belgium) there are various such sites: Het Muntplein, de Boomsesteenweg, etc ("Graffiti", n.d.).

data-mines for the excavation of artistic resources, by means of appropriationist techniques, can be found. Looking at artistic participatory creation with the EM in mind, a balance is struck between the previous two where public domains, creative commons and private creative property are equally and proportionally available sources for data mining.

Starting from a premise of (A) free access to information, and (B) sharing by all of it, one can search and find cultural resources for appropriation in various directions. Creating one's own open content that serves as source material for oneself and for others is a first way; using existing materials as creative sources which are available to the public and thus are not (anymore), copyrighted (though could be again after recycling) is a second way, by means of fair use of existing yet highly limited bits of copyrighted material is a third way, and lastly by infringing on intellectual property (which could be copyrighted, trademarked or patented) arguably supported by fair use or freedom of speech. The resources are thus not centralized under one license, nor within one realm. The artist finds fragments in various sites from various backgrounds protected by various mechanisms more or less enclosing each fragment.

An observed weakness when looking through the CLM, at creative participation by means of appropriationist mechanisms, is fragmentation. Looking at the same by means of the LSM simultaneously sheds light on variation and thus appreciation for the local or the idiosyncratic. This could be seen within the Starbucks/Mozilla case described in Chapter Four.

The LSM unearths more clearly sensitiveness for cultural details and less conform variations compared to the dominant forms and mechanisms. Such cultural exploration and innovation are more obvious through tools and processes unfitting the standardization of the public sphere by market forces through conformity of production, products and commerce by means of regulations. The latter are developments becoming utterly clear and supported through the CLM. Indeed the homogenized communities resulting from standardization seen through the CLM might lead to an enlightened appreciation of clarity, efficiency, and maximization of profit, yet the appropriation of logos, the artistic play, the consideration of open source culture would then be, if not smothered, entirely kept in the dark. Instead of thinking in terms of double standards, where an actor for instance simultaneously shuns as well as thrives on appropriation, one could find reasonable grounds for this complex system by looking at it through the EM and seeing at least an intention to balance various competing views within and between the private, and the public. So too, could the Mozilla part of the case, described in Chapter Four, be a search for balance. From the information available, surrounding the paintings as they are presented online, it seems that Mozilla hasn't pressed any charges against Loz. His artistic action could understandably be supported, seen through

the CLM, by arguing on the basis of the Fair Use Clause and that the rendition by the artist is not being intended as inflammatory and thus providing positive public relations within a medium not easily accessible for an otherwise purely online product: a painter's tangible canvas. Again, through the LSM, as well as the EM, any litigation would be seen, through the first, as aggressive, and unnecessary, and through the second as unbalanced, as an inefficient use of resources, and as limiting the growth and availability of public domains or creative commons.

Looking at this by means of the CLM would make it for these variations difficult to be supported, as these variations in copyright mechanisms could, to some, imply a negative fragmentation. The negative view might be one where these variations are seen as unnecessary convolutions of copyright mechanisms, shown in the form of various licenses available, and a convolution of various sets of creative work of which each follows separate and sometimes incompatible licenses. The example previously given is the one where certain works are open for commercial exploitation whereas others are not due to the variations in their licenses these works are incompatible when appropriating them into a second-generation work. It is possible that such fragmentation is seen, when analyzing variations in copyright mechanisms, to be (A) resulting in various sets of creative resources, and (B) not always easily combinable. Looking at the various licenses described in Part One and in Part Two Chapter Four and Five, through the LSM, makes it acceptable, as conformism needs no promoting nor does homogenization per se, but rather diversity, decentralization or non-monopolistic dynamics. I argue that fragmentation seen not simply as negative makes even more sense when trying to understand it through the EM and through Boyle's concept of *openness to alternatives and additions* but even more so through his concept of *developmental appropriateness* (Boyle, 2004, p.9) Boyle's first concept speaks for itself as a motivator for innovation, the second is a steering away from unified solutions that should fit all. In this the balance is stricken between a legal framework that is available to all but has accents, better befitting one or other community, and its forms of expression.

Appropriationist artists are a growing community, especially through the ease of digital resources but also through the availability of materials under copyright mechanisms that support such artistic approaches; some of the Creative Commons Licenses and the Licence Art Libre are two of these mechanisms. Though appropriationist artists, as discussed previously, also wish to make social statements about their own socio-cultural environment. They do this by making their own form of statements with which they participate throughout the public spheres. As their participation collides with that of other actors, such as

proprietors, a struggle commences. Looking at the series of actions leading to creative expressions, appropriationist artists wish for pushing creative boundaries through innovation or avant-garde expression. In this they possibly take the lead. Though, on a socio-economic level they run behind the appropriating corporations. Factors fundamentally related to market issues prevent the artists from appropriating those pieces of culture which they see as signs of their own times, or signs of the public spheres they participate within. No additional copyright mechanisms can solve this problem because essentially it is the cultural material itself that needs to shift from one mechanism into another, as for instance shortly described in Chapter Four in relation to a migration from the Creative Commons License to the License Art Libre. The Fair Use Clause is the *one* unstable area within copyright for the end-user to rely on when commenting, parodying, pastiching, making collages, adbusting, and so on, based on the *current* and dominant cultural ecosystem.

The Mozilla part of the case described in Chapter Four, differs from the Starbucks part of the same case in its absence of directness, discontent, and critique. It is already clear that the artistic appropriation of logos or brand names falls under an appropriationist mechanism named adbusting, another series of marginalized actions. This creative technique is, more then often, an expression of wit or social critique showing disapproval of one or other action by the corporation to which the logo or brand is associated. The proprietor and possibly, its clientele or the public in general might disapprove of the appropriationist mechanism in terms of vandalism, defamation or other associations it might deem delinquent. The parties engaging in adbusting might feel it is their moral obligation to share their views in addition to the corporate views shared within the same and presumably open space of the public. The adbuster might believe that any limitation of this open sharing is an infringement on democratic public participation as much as the corporation might feel that any speech opposing their marketing communications is an infringement of their freedom to commerce. Though, again others might wonder what the physical damage could be when the logo is digitized or copied on a canvas.

The proprietors, their supportive consumer base and their views can be seen clearly through CLM. The appropriationist artist-activists has a highlighted place in the public spheres when observing them through the LSM or, to a certain extent, through the EM. Seen through the CLM one is possibly provided with a clear picture on economic arguments in terms of consumer trust, market share, and reduction of profit. From the opposition's point of view, especially deliberated through the LSM and to a lesser degree the third Model too, the term “trust” is possibly filtered as a euphemism for “ignorance”, the word “share” probably

for “monopolize”, and the word “profit” for “maximization” or “greed”. This is a simple translation or re-articulation of the same processes.

Certainly by now it should have become obvious not simply one clear-cut answer can be given on how our cultural environments are dealt with or should be dealt with when interacting with and in them. Though, evaluating the examples from the history of artistic forms of expression, and from the three cases it is more than clarified that artists are not pirates and that their degree of appropriation is not simply based on economic or market fundamentals but rather on participatory and expressive bases, not excluding the economic incentives. Artists are dealing with various freedoms and prohibitions, some are valid others tend to shift away from that validity into for instance the criminal, or the immoral. In their struggle they have been choosing from an array of tools, processes or mechanisms that have been helpful in trying to find answers to this same struggle with a lesser or higher degree of success. It remains a sensitive and important struggle to not simply rigidly judge the means used within the public sphere to comment on one another, but also to actively partake in and with the public sphere on a grassroots level. Again, if the enclosure of cultural property becomes too rigid in space-time, artists and activists will increasingly find it difficult to partake in legal disputes. The difficulty might then lie in (A) whether or not the manner of partaking is legal, and (B) how to juggle the partaking with their struggles on other planes such as the aesthetic, morality, marketability, efficiency and accurateness of their expression.

Seen from the mechanisms of appropriation, being different from piracy, if any degree of copying of content were unconditionally illegal one would have a cultural environment in a state of arrest. Again, this arrest would be instigated due to the lack of logistics and budgets of certain appropriating parties, which, due to digitization, is a set of actors not decreasing in size.⁷⁴ This is whilst compared to the issues of artistic non-pirate copying not arresting an environment for market activity. Neither of the two should be ignored, neither of them is of a lesser importance, neither simply, nor linearly, nor unconditionally defines the other. Rigidity in enclosures were discussed in the cases surrounding *The Simpsons* - a case of rigidity concerning an indiscriminately one-size fits all approach towards where and for how long property can be appropriated - as well as in the Starbucks part of the second case - a case of hyper-rigidity concerning where the appropriated logo could be viewed as well as what the accepted form could be. Decrease of this rigidity

⁷⁴ Consumer-users and other appropriators can be found on various sites such as www.youtube.com

was seen in the case surrounding Eno & Byrne - a case maintaining enclosure while providing open sources within the enclosure.

Looking at copyright simply through the CLM does not provide a complete enough image of the artistic struggle and the artist's need to use particular mechanisms. The line between fair use, while appropriating copyrighted bits, and flat-out infringement, remains, at best, vague. The potential restitution when having crossed that line, only barely, is draconian. When the same is analyzed by means of the LSM, the proprietors and the initial authors seem left out in the cold as well as the appropriationist artist who can not find legal mechanisms strong and secure enough to provide support in the act of appropriating parts of any copyrighted work not under the copyleft mechanisms. The answer to these shortcomings seems implied when all factors can be seen in the picture and can be taken into account. Observing the public sphere with its creative commons and public domains in tension with the increasing private sphere, a view through the EM seems to show an answer. The balance between proprietary and open culture provides an environment for culture and creative participation with, in and through it. Though indeed the user is more clearly given a place when looking to the struggle by means of the latter model, the institutions supposedly needing to provide means and support for such users are simply not focused on them but rather on the proprietors or the authors (of the initial works, or those works properly gone through the copyright clearance system). The law, although executed equally for all, from a cultural point of view, possibly needs a reevaluation to include provisions taking into account changing mechanisms utilized by the proprietors, the authors, *and* the users, such as appropriationist artists. The legal experts and legislators might not only wish to consider implementing concepts within the articles of the law, that are for instance based on an understandable fear for theft, supporting authors, and proprietors such as publishers, but they might also wish to find ways to promote culturally innovative mechanisms that encompass such users as appropriationist artists. Now with digital technologies, and the Internet, the consumer-user potentially takes on a more active role in the reinterpretation of culture.

There is a need for reorganization or an addition of processes turned into mechanisms supported by newly inaugurated institutions and legal structures providing services and agency towards *re*-usage of cultural assets. The Creative Commons License or the License Art Libre are transnational initiatives that must continue and need more support. Though, the institutions or mechanisms one might think of are focused on existing copyrighted materials which are not under these licenses, and through which the users, such as artist appropriators,

find supportive cost-effective and legal provisions, more stable and versatile than a Fair Use Clause, in harmony with provisions supporting authors as well as proprietors.

Yes indeed, clearance houses and insurance companies provide mechanisms that take care of the clearance of copyrighted material, amongst others, but these services are still highly expensive and result in the possibility that an individual artist never sees a dime but simply invests in these companies whom are obviously serving the artist with the bill or, as for instance record companies seemingly understandably do, need to recuperate the investment made in recording and marketing the artist before serving the artist with a nice check. In addition, it is more than sad that works are no longer in circulation because clearance of copyrighted material within them is no longer economically viable or because the original proprietors cannot be tracked down.⁷⁵

Appropriation is a set of mechanisms that provides the opportunity to place oneself (being the artist, consumer, etc.) in a cultural historical context next to being aware of oneself as well as the instances in history as one interprets the cultural environment now or as instances could be interpreted in the future (Bagwell, 2004). When copyright mechanisms and market priorities jeopardize this, it is certainly not simply the weight of an individual's wallet that is at stake but rather additionally their socio-cultural and psychological being as individuals as well as communities in the world. In the struggle by artists, in finding some balance or compromise, including these previously mentioned factors, copyright mechanisms provide some, yet still not sufficient, support. An answer might not be found here and now on what would be sufficient but one thing is for sure: one or other mechanism should never take the upper hand in the debate to that extent that the debate is arrested.

It remains of the essence that meaning be expressed in spoken, rational language as well as through artistic forms that give meaning to our being, intertwined with the world: through sound, image or other media and by being critically interlocked with these. The intention and purpose of struggling through a debate should be to keep the channels of communication open. Any mechanism too strongly opposing this inevitably destroys systems and media of expression, interaction, participation and debate.

⁷⁵ As mentioned previously, the latter kind of works is referred to as "orphan works". The cost of finding the holders of the rights is too high to the appropriationist artist resulting in an arrest of innovation. From my perspective this extreme example, possibly no longer at the fringes of the legal execution of rights clearance, creates zombified culture: a song can no longer be heard, a book can no longer be read, a documentary can no longer be seen... we know they are out there lurking in the twilight.

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